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RELATIONSHIP OF NRA TO GOVERNMENT CONTRACTS AND CONTRACTS INVOLVING THE USE OF GOVERNMENT FUNDS

By
Jordan D. Hill

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F O R E W O R D

This study of the Relationship of NRA to Government Contracts and Contracts Involving the Use of Government Funds was prepared by Mr. Jordan D. Hill of the NRA Organization Studies Section, Mr. William W. Bardsley in charge.

The study is devoted in large part to an analysis of the provisions of Executive Orders 6246 and 6646, and of certain aspects of their administration. The remainder of the study deals with Executive Order No. 6767 and Administrative Order No. X-48, both of which in effect provided for limited or optional exemptions from certain code provisions to members of industry when making bids to government agencies.

Probably the most complete sources of information on this subject are contained in the files of the Government Contracts Division of the NRA. These files contain six thousand odd cases originating in practically all major governmental agencies and numerous agencies using government funds. They also contain complaints arising on practically all NRA basic codes and supplements. In fact the files of that Division may well be considered a treasury on matters relating to the general subject of government contracts during the life of the National Recovery Administration. Unfortunately, however, these voluminous files were in such constant use that it was impossible to get sufficient access to digest them in the period available for this study.

Another source of information that was discarded was the files of the governmental agencies in which complaints arose; these files were equally voluminous and far more inaccessible. Still another source was the files of the some seven hundred code authorities and of the many thousand members of industry who were affected by the orders. It was quite impossible to explore these.

There remained the decisions of the Comptroller General on the cases arising under the terms of the Executive Orders, which were in printed form and accessible. These decisions, although few in number, were more far-reaching, final, and vital than the decisions of any administrative officer. They formed an excellent source of material. Another accessible source of information was the various contract forms and instruction bulletins issued by the major governmental procurement, leading, granting and spending agencies, which set forth the procedure of these agencies in connection with the Executive Orders.

At the back of this report will be found a brief statement of the studies undertaken by the Division of Review.

L. C. Marshall
Director, Division of Review

March 9, 1936

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REVIEW OF STUDY ON RELATIONSHIP OF NRA TO GOVERNMENT

CONTRACTS AND CONTRACTS INVOLVING THE USE OF GOVERNMENT FUNDS.

This is a study of a subject with which practically all administrative personnel of the NRA had some contact in a greater or lesser degree, It was a feature of the NRA which was familiar to the contracting and purchasing branch of every agency of the federal government, to (the majority of) state and municipal purchasing and contracting agnecies using federal funds, to practically all members of industry and to the public in general (through the much publicized Ford Case).

NRA's relationship to Government Contracts and contracts involving Government Funds was primarily based upon the provision of two Executive Orders No. 6246 of August 10, 1933, and its successor No. 6646 of March 14, 1934, both of which in general required code compliance on the part of government contractors. The major portion of this study is devoted to an analysis of the provisions of these Orders and a study of certain aspects of their administration. The remainder of the study touches briefly the background and provisions of Executive Order No. 6767 and Administrative Order No. X-48, both of which in effect provided for limited or optional exemptions from certain code provisions to members of industry when bidding to Government Agencies.

No attempt has been made to conclude whether Executive Orders 6246 and 6646 were successful or unsuccessful as a secondary means of enforcing Codes of Fair Competition and the President's Reemployment Agreement, as either such conclusion would be unsustainable from the facts that are available. Numerous individual examples can be given to sustain either holding, but any attempt to evaluate the actual, not theoretical, compliance, or non-compliance involved in several billions of dollars worth of contracts, subcontracts, or sub-subcontracts, etc., subject to the provisions of these Orders, would entail a study and investigation far beyond the necessary limitations of this study.

If it could be concluded that everyone who signed a compliance certificate was complying and continued to comply with all provisions of each Code to which he was subject, and that the only violators of the provisions of the Executive Orders, supra, were those whose contracts were cancelled, or were recommended for cancellation, the problem would be resolved to more or less a mere matter of simple arithmetic, and it would undoubtedly be found that the Orders were unqualifiedly successful. The writer, however, is unable to believe that any informed person would accept such a simple formula for determining the degree of success of these Orders.

The most that the writer hopes to have accomplished in this study is to have shown how the purposes of these Orders were obstructed by conflicting statutory regulations governing federal purchasing, uncoordinated inter-departmental administration, and by the rulings of the General Accounting Office, and as a result of these findings to attempt to find means to circumvent similar difficulties in any future comparable regulations either through Executive Order or statute.

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In order to avoid conflict with existing Governmental purchasing statutues, any future regulation of Government contracts attempting to restric bidders and contractors to a certain class or classes should have the force and effect of a stutute rather than an Executive Order, and should specifically provide for the modification or repeal of any existing statutes in conflict with its requirements.

In order to avoid uncoordinated inter-departmental administrative efforts evidenced throughout the various agencies of the Government by the varying and conflicting compliance certificates and contractual clauses incorporated in the Supplement of this report, some one agency should be designated with sufficient authority to draft the clauses necessary to enforce the provisions of the regulation in all contract forms and compliance certificates if used. This agency should likewise be delegated sufficient authority to make findings as to violations and interpretations of the provisions of the statute, which findings and interpretations should be made binding on all Government Agencies, including the General Accounting Office. With this authority and sufficient personnel to promotly investigate cases and make findings on all alleged violations, it is believed that such a statute would be far more effective in accomplishing its purpose than were Executive Orders 6246 and 6646.

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CHAPTER I

INTRODUCTION

Executive Authority over Government Contracts, in relation to the National Recovery Administration, was exercised through three Presidential Orders, Executive Order 6246 of August 10, 1933, 6646 of March 14, 1934 and 6767 of June 29, 1934.

The first two orders, in general, required compliance with codes and the President's Reemployment Agreement on the part of government contractors; the latter order, although termed a modification of Executive Order 6646, was in fact, a modification of codes containing price posting provisions, inasmuch as it permitted members of industry under those codes to quote prices to the government up to fifteen percent below their posted prices and still not be in violation of provisions prohibiting sales below posted prices.

It is the purpose of this report to discuss and evaluate each of these orders separately and to attempt to analyze their purposes, accomplishments and failures. It is necessary to qualify the above sentence by the word "attempt" when the vast scope of these orders is realized, i.e., the thousand of firms, the tens of thousands of contracts, purchase orders, loans and grants, and the billions of dollars which were affected by and subject to their provisions. Any assumption that everyone, who executed a compliance certificate or signed a contract containing a compliance clause, was complying with all provisions of every code to which he was subject would be most naive, on the other hand, a totally converse assumption would be most unfair to all persons who acted in good faith in executing such contracts and certificates. Any attempt, moreover, to determine or even estimate what percentage of persons executing these certificates and contracts were complying in full with their conditions would be futile, therefore, only their theoretical effect and mechanical operation can be considered in this study.

Before discussing government contracts under the Executive Orders, supra, it may be well to glance briefly at the Philosophy and Law of government contracts prior to their promulgation. Theoretically, the Federal Government stood in the same category as did a private citizen in contract matters; practically, that was not the case. This fact, plus the nearly three hundred laws applying solely to the contracts of the Federal Government, placed federal contract law in a class by itself, and a very important one at that, as a part of our federal system of jurisprudence.

In connection with federal purchasing statutes, and especially Revised Statute 3709, the courts have held that

> "the agents of the government in the matter of advertising for the letting of contracts have no discretion. They must accept the lowest responsible bid or reject all and readvertise."(*

(*) Scott vs. U.S. 44, C. T. C. L. 524

The answer to who is the "lowest responsible bidder" has been productive of endless litigation in the courts but has been summarized in Butler vs. Darst, 38 L.R.A. New Series, Page 655, with supporting cases as follows:

> "The general rule as deducted from the case is that in awarding contracts of this nature, public authorities are vested with discretion in determining who is the lowest and best bidder, and their decision will not be interfered with by the courts, even if erroneous, provided it is based on a sound and reasonable discretion founded on facts and exercised in good faith in the interest of the Public, without collusion or fraud nor corruption, nor from motives of personal favoritism nor ill will and not abused."

One of the greatest problems faced by the government in making purchases was the necessity of guarding against unfair or corrupt uses of his powers by the purchasing officer. The nature of this danger and of the legal restrictions, which as a consequence had been generally thrown around the authority of the government purchasing agent, are in the large too well understood to be repeated here.

There is, however, little doubt, in the mind of anyone acquainted with private purchasing by large corporations, as to what would be the fate of a private purchasing agent who awarded all contracts to the "lowest responsible bidder" without regard to the numerous other factors, which are closed to the government purchasing officer.

The philosophy of governmental contracting prior to the NRA was to drive the hardest bargain possible regardless of what means were used by the other party to the contract in fulfilling its terms. The result of such a policy obviously forced the government contractor to cut costs wherever and whenever possible, and more times than not the easiest cost to cut was that of labor. On the other hand, this policy frequently attracted as bidders, a class of manufacturers or contractors who habitually exploited labor and resorted to other unfair business methods in order to maintain a competitive advantage over their business rivals.

With the passage of the NIRA and the Congressional declaration of policy thereunder, "to eliminate unfair competitive practices - - to improve standards of labor - -" it immediately became apparent that the government could not on one hand promote industrial recovery by advocating such a policy for industry and the country at large, and on the other hand continue to deal with persons refusing to comply with this policy.

Two courses were open, one being to change or amend the statutes regulating government contracts, the other being to make use of the extraordinary powers delegated to the President by Congress in the emergency legislation of 1933. The Administration chose the latter course.

CHAPTER II

EXECUTIVE ORDER 6246

A. PROMULGATION OF ORDER

The administration's decision to require code compliance of government contractors and suppliers was made early in July, 1933, and Executive Order 6246 was issued on August 10, 1933.

The Philadelphia Public Ledger of August 11, 1933, carried the following statement:

> "The government's decision thus to bring under the Codes all contractors dealing with the government was made July 2, after careful examination of all factors involved by Attorney General Cummings. Mr. Cummings placed all the facts in the case before the President yesterday and Mr. Roosevelt thereupon prepared the Executive Order."

The New York Herald Tribune on August 11, 1933 carried this statement:

> "Marvin McIntyre, Assistant Secretary to the President, said that the Order covered all public works and supplies contracts for the government. He said that the supplies for which appropriations were made in the Treasury-Post Office Act signed by President Hoover on March 3, amounted to about $500,000,000 for the fiscal year 1933 and 1934.
>
> "The opinion of the Attorney General, Homer S. Cummings, as to the validity of the Order was sought and he affirmed its legality almost two weeks ago."

B. ANALYSIS OF PROVISIONS OF ORDER

I. AUTHORITY

The Order was drafted by virtue of the authority vested in the President by the Act of Congress entitled "an Act to encourage National Industrial Recovery, to foster fair competition, and to provide for the construction of certain useful public works, and for other purposes" approved June 16, 1933 (Public No. 67, 73d Congress). The authority vested in the President would appear to be that contained in Section 10 (a) which provides:

> "The President is authorized to prescribe such rules and regulations as may be necessary to carry out the purposes of this Title ....."

It should, however, be noted that the above Section delegated no specific authority to the President to modify existing government contract statutes and it must, therefore,

be assumed that the above provision was interpreted by the Attorney General to imply such authority.

2. AGENCIES AND SUPPLIES AFFECTED

Section 1 of the Order states:

"Contracts for Supplies. - - - Every contract entered into within the limits of the United States (by which is meant the 48 States of the Union, the District of Columbia, the territories of Hawaii and Alaska, the Panama Canal Zone, Puerto Rico, and the Virgin Islands) by the United States or any of its agencies or instrumentalities for supplies, mined, produced or manufactured in the United States as contemplated by Section 2, Title III, of the Act approved March 3, 1933, entitled 'AN ACT Making appropriations for the Treasury and Post Office Departments for the fiscal year ending June 30, 1934, and for other purposes' (Public,No.428, 72d Cong.), except as set forth in the proviso under paragraph (a) below, shall provide and require that:"

It should be noted that the above Section specifies "supplies" as contemplated by Section 2, Title III, of Public No. 428, and that it does not mention "contracts for construction, alteration or repair of any public building or public work" as contemplated by Section 3, (a) of Title III, supra. It is, therefore, reasonable to assume that the Executive Order was only intended to cover supply contracts and not construction contracta. (*)

3. COMPLIANCE (Shall comply)

Section 1 (a) of the Order provides that on all of the above mentioned contracts for supplies:

"The contractor shall comply with all provisions of the applicable approved code of fair competition for the trade or industry or subdivision thereof concerned, or, if there be no approved code of fair competition for the trade or industry or subdivision thereof concerned, then with the provisions of the President's Reemployment Agreement promulgated under authority of Section 4 (a) of the foregoing act, or any amendment thereof, without regard to whether the contractor is himself a party to such code or agreement:

"Provided, That where supplies are purchased that are not mined, produced, or manufactured in the United States the special or general code of fair practice shall apply to that portion of the contract executed within the United States."

(*) Appendix No. 60, Section 1-C.
(In Supplement in NRA. archives, also in Addendum)

The above Section only required that contractors shall comply with the applicable Code or the President's Reemployment Agreement. It did not require bidders to the government contracts to comply, nor did it require that government contractors comply, with other than the "applicable code". The Section further specifically stated that such compliance should be "without regard to whether the contractor is himself a party to such code or agreement." In other words, neither signing the President's Reemployment Agreement nor signing and assenting to a code were required as prerequisites to obtaining contracts with the government. In this way the Order limited compliance to the amount of money actually spent by the government for supplies as contemplated by Section 2 of Title III of the Treasury Post-Office Act, above sentenced.

4. PENALTIES

Section 1 (b), the Penalty Clause, provided that:

"If the contractor fails to comply with the foregoing provision, the Government may by written notice to the contractor terminate the contractor's right to proceed with the contract, and purchase in the open market the undelivered portion of the supplies covered by the contract, and the contractor and his sureties shall be liable to the Government for any excess cost occasioned the Government thereby."

This Section, by making cancellation or termination of contracts permissive, apparently left it to the discretion of the heads of executive departments and agencies to decide whether they would cancel a contract for code or P.R.A. non-compliance. It also, bu failing to designate an agency to determine non-compliance, left it moot as to how such determination should be made, that is, whether non-compliance should be determined by the courts or by administrative or executive officers. It also left it most indefinite as to who should determine non-compliance with the President's Reemployment Agreement in the cases of firms not parties thereto nor subject to an approved Code.

The final provision of the Order, Section 2, provided that:

"No disbursing officer shall be held liable for any payment made under the provisions of the foregoing act, or any executive order issued under authority of that act, or for the unobligated balance of any overpayment involved."

This Section merely relieved disbursing officers from any individual responsibility for overpayment in event of cancellation so that in such an event, they could not be personally liable for any civil action which might be taken by parties to cancelled contracts.

CHAPTER III

ADMINISTRATION OF EXECUTIVE ORDER 6246

As no one agency or department was charged with the administration of the provisions of Executive Order 6246, it is impractical, if not impossible to assemble material reposing in the files of various Government Departments and Agencies relative to its administration.

However, as the paramount cases arising under its provisions eventually found their way to the General Accounting office, these cases can be studied and analyzed through Comptroller General McCarl's rulings relative thereto.

In spite of the provisions in the Order which required code or President's Reemployment Agreement compliance "without regard to whether the contractor is himself a party to such code or agreement", the press immediately circulated the impression that federal contractors were required either to sign the code to which they were subject, or the President's Reemployment Agreement. The following statements were carried by the press immediately after the issuance of the Order: New York Herald Tribune, August 11, 1933: "All United States supplies must be bought of Code firms." The Philadelphia Public Ledger, August 11, 1933: "President orders United States contractors to sign up Codes. All firms supplying Government goods must be enrolled." New Orleans Tribune, August 11, 1933: "United States to cancel contracts of firms which violate or refuse to sign Codes." Chicago Daily Tribune, August 12, 1933: "Uncle Sam buys only from firms having Blue Eagle."

It is evident from these statements that there was some misunderstanding along the line as to the implications of this Order.

A. CASES ARISING

1. COMPTROLLER GENERAL (A-50713)

As further evidence that this Order was widely misconstrued, the Public Printer, under date of August 24, 1933, wrote to Comptroller General McCarl as follows:

> "Your advice is requested as to whether the above low satisfactory bidder of $12\frac{1}{4}$¢ per pound may be rejected because bidder is not a member of the NRA, and award to next above satisfactory low bidder of 13¢ per pound because bidder is a member of NRA, and also, as to whether this procedure is to be followed by the Public Printer in similar cases if and when they arise."

The Comptroller General, under date of August 31, 1933, replied as follows:

"The quoted terms of the Executive Order of August 10, 1933, do not require that a bidder or a contractor with the United States for the delivery of supplies shall be a 'Member of the NRA,' as expressed by you, but the requirement is that every contract for supplies shall contain a stipulation that the contractor shall comply with the applicable Code of Fair Competition for the trade or industry or subdivision thereof concerned, and if no such Code, then with the President's Reemployment Agreement 'without regard to whether the contractor is himself a party to such Code or Agreement'. The contract must provide that in the event of violation of such stipulation, the United States may terminate the contract....." (*)

2. COMPTROLLER GENERAL (A-47742)

On September 7, 1933, there was issued by the Administrator, Federal Emergency Administration of Public Works, to whom the President had theretofore delegated certain of his authority under Title II, of the Act of June 16, 1933, Bulletin No. 51, (**) entitled "Information relating to the negotiation and administration of contracts for federal projects under Title II, of the National Industrial Recovery Act," and there appears therein a Section as follows:

"Section 53. Requirements - - (a) No bids will be accepted from any contractor who has not signed and complied with the applicable Code of Fair Competition adopted under Title I of the National Industrial Recovery Act for the trade, or industry, or subdivision thereof concerned, or, if there be no such Code of Fair Competition who has not signed and complied with the provisions of the President's Reemployment Agreement."

The most prominent case arising from the provisions of the above mentioned Bulletin was that of the George F. Driscoll Company, who, on February 28, 1933, submitted a bid for the construction of the Post-Office Annex in New York City. No award was made as a result of the bids submitted on the above dates and on September 8, 1933, additional bids were requested, requiring compliance in accordance with the above mentioned Bulletin. On October 2, 1933, the bids were opened disclosing that the George F. Driscoll Company were low bidders by approximately $112,000. The Driscoll Company signed the President's Reemployment Agreement, showing the date of execution of same as September 29, 1933. This Agreement, however was not received in the New York City office of the United States Department of Commerce for filing until October 5, 1933, and its envelope showed a postmark of 8:30 P.M., October 4, 1933, Grand Central Annex, New York.

(*) Appendix No. 1, Page 1-III (in Supplement in NRA archives) 13 Comp. Gen. 65(A-50713)

(**) Appendix No. 3 (in Supplement in NRA archives)

A complaint was filed by one of the bidders alleging non-compliance with Executive Order 6246, and on October 5, 1933, the Driscoll Company was notified that their bid had been rejected because they were not a party to the President's Reemployment Agreement on the day of submitting their bid, and in compliance with PWA Bulletin No. 51, Section 53. The Driscoll Company immediately petitioned the court to obtain an injunction restraining the Government from awarding the contract of this work to any bidder other than themselves, and on October 30, 1933, Justice F. D. Letts, of the District Supreme Court, issued a temporary injunction restraining Secretary Woodin from making any award and set a hearing for November 3. On November 3, the hearing was postponed to November 8, but in the meantime, the Secretary of the Treasury wrote the Comptroller General, setting forth all the facts and requested a ruling.

On November 8, 1933, the Comptroller General advised the Secretary of the Treasury in part, as follows:

> "It seems unnecessary at this time to determine whether, as urged, the provisions of Section 53, of Bulletin No. 51, Federal Emergency Administration of Public Works, so go beyond and supplement the law as to be without force or effect under the rule stated in numerous cases, including United States vs. 200 Barrels of Whisky, 95 U.S. 571; United States vs. Eaton, 144, U.S. 677.
>
> "The record discloses that the low bidder signed the President's Reemployment Agreement on September 29, 1933, and that said Agreement is now on file with the proper authorities. It shows further, by report of a Government Inspector, under date of October 11, 1933, that said low bidder 'is paying above the NRA wage scale and is conforming to the hours thereof.' Thus it appears not only that the low bidder had signed the President's Reemployment Agreement before bidding, but that such bidder is complying with the covenants thereof.
>
> "When there is considered the purpose and intent of the National Industrial Recovery Act, the serious condition sought by it to be remedied, and the President's prompt action thereunder, with a single purpose, to secure through patriotic cooperation with his program by employers, increased wages and employment for those out of work, it would appear out of line with the Recovery Program and far afield from the high plane on which the President appealed to employers for support of his plan to deny, for other than impelling reason, a low bidder for public work, who has in the vital things fully cooperated with the President's plan. No such reason appears in the instant case.
>
> "In the light of the facts appearing, and the applicable law, it is hereby decided, the appropriation here under consideration is not available for payments under a contract for the public work bid upon, with other than the bidder, the George F. Driscoll Company." (*)

(*) Appendix No. 1, Page IX-XVI (in Supplement in NRA archives) 13 9775 Comp. Gen. 121 (A-47742)

It is interesting to observe that the Comptroller General, in his decision, avoided ruling on the authority of the Federal Emergency Administrator of Public Works in issuing such requirements as were stated in Section 53, of Bulletin No. 51. In view of applicable law in such an instance, it should, however, be noted that Section 53 was applied in this instance to a Public Works contract, whereas, Executive Order 6246 only included contracts for "supplies."(*) It might, therefore, be reasoned that Section 53, of Bulletin No. 51, was an independent Administrative Order, as its requirements were a complete deviation from the requirements and scope of the Executive Order.

3. COMPTROLLER GENERAL (A-50815)

Another issue arising under the Executive Order was a request from the Administrator of Veterans' Affairs directed to the Comptroller General as to:

> "(1) Whether the Veterans' Administration may accept bids for the delivery of milk and cream at the Veterans' Administration Hospitals within said area, at prices less than the wholesale price schedule as set forth in License Series --License No. 1 (Form M-3)--issued by the Agricultural Adjustment Administration of the Department of Agriculture, and (2) whether in advertising for bids it would be proper to insert the following: 'Bids not in conformity with provisions of Marketing Agreement for Milk and Cream, Chicago Milk Shed, promulgated by the Secretary of Agriculture, under authority of the Agricultural Adjustment Act of May 12, 1933, as amended, will not be considered.'"

The Comptroller General, under date of September 7, 1933, advised the Administrator of Veterans' Affairs as follows:

> "The specifications for bids for furnishing milk and cream to the Veterans' Administration Hospitals in Chicago should contain a notification to all bidders substantially as follows:
>
> "The attention of all bidders is invited to the fact that the contract to be entered into for delivery of milk and cream to the Veterans' Administration Hospitals, as herein stated, will contain the stipulation that: '<u>The contractor shall comply with all provisions of the Marketing Agreement for Milk</u>, Chicago Milk Shed, entered into between the Secretary of Agriculture and certain contracting producers and contracting distributors.....'"(**)

The underlined phrase of the above decision of the Comptroller General should be carefully noted, in view of subsequent ruling on October 10, 1933, to the Postmaster General in reply to the following questions:

(*) Appendix No. 60, Section 1-C (in Supplement in NRA archives)
(**) Appendix No. 1, Pages IV -V (in Supplement in NRA archives) 13 comp. Gen. 100 (A-51319)

"(1) Assuming that 13¢ was the prevailing filling-station price, as well as the bidder's posted price, state tax included, on the date the proposal was submitted, will acceptance by the Department at a later date result in a binding contract, regardless of the fact that the posted and prevailing price has changed in the meantime?

"(2) Does the proposal of the Penn Oil Company to furnish at 2¢ below the prevailing price contravene the condition of compliance with the applicable approve Code, or will acceptance by the Department result in a binding and enforceable contract?

"(3) Where the contract contains the stipulation required by the President's Executive Order dated August 10, 1933, that the contractor will comply with all provisions of the applicable approved Code of Fair Competition, what concessions as to reduced rates or discounts can be accepted by the Department on proposals offered by vendors for:

"(a) Service station delivery by retailers?

"(b) Tax tank wagon deliveries by refiners or wholesalers?"

"(c) Tank car delivery by refiners or wholesalers?"

The Comptroller General's reply to the above questions were in pertinent part as follows:

"The provision of the Code with reference to the posting of prices, etc., do not apply to sales to the United States. See Title 49, Section 3, United States Code. See, also Interstate Commerce Commission Conference Ruling 107, approved January 3, 1927, and Atchison, Topeka and Sante Fe Railroad vs. United States, 256 U.S. 205.

"Section 3709, of the Revised Statute, requires purchases on behalf of the United States to be made through competition, and bids offering to the Government different prices on a different basis are not to be understood as in contravention of any Code, and acceptance of the low bid may be accordingly. In other words, the adoption of the Code of Fair Competition does not change or modify the heretofore existing procedure for the purchase of gasoline for the United States on the basis of competitive bids." (*)

The following excerpt from 13 Comp. Gen. 127, to the Secretary of Agriculture under date of November 10, 1933, might also be considered at this time in connection with this same issue:

(*) Appendix No. 1, Pages VI-VIII (in Supplement in NRA archives)
13 Comp. Gen. 100 (A-51319)

"The provisions of these Codes approved by the President pursuant to statutory authority have the force and effect of law. Hence, the rules governing the construction of statutes are for application in construing such provisions. Therefore, under the well-established rule that general words in a statute do not include the Government, the Marketing Rules, Article V-XIII, of the Code for the Motor Vehicle Retailing Trade, would appear to have no application to sales to the Federal Government. See 13 Comp. Gen. 65; Id: 76; Id 100, and authorities therein cited. (*)

Also the following ruling of the Comptroller General to the Administrator of Veterans' Affairs, under date of January 2, 1934:

"In the first place, the effect of said paragraph would be to require the United States to purchase its supplies at the price fixed in the Marketing Agreements Licenses, and it was held in 13 Comp. Gen. 100, that Section 3709, Revised Statutes, required purchases on behalf of the United States to be made through competition and that bids offering to the Government different prices on a different basis are not to be understood as in contravention of any Code. See, also, decisions of November 10, 1933, 13 Comp. Gen. 127, and November 14, 1933, A-51800. The same ruling applies to Marketing Agreements. The adoption of a Code of Fair Competition or a Marketing Agreement, fixing prices generally, does not change or modify the heretofore existing legal procedure for the purchase of supplies in behalf of the United States;....." (**)

The Comptroller General appears to have based his rulings, supra, that price posting provisions, Marketing Agreements, etc., do not apply to sales to the United States on the following authorities cited in 13 Comp. Gen. 100. Title 49, Section 3, United States Code, and Atchison, Topeka and Santa Fe Railroad vs. United States 256, U.S. 205. The pertinent part of the former reads as follows:

"(2) <u>Payment of Freight as a prerequisite to delivery</u>. No carrier by railroad, subject to the provisions of this Chapter shall deliver or relinquish possession at destination of any freight transported by it until all tariff rates and charges thereon have been paid except under such rules and regulations as the Commission may from time to time prescribe to assure prompt payment of all such rates

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(*) Appendix No. 1, Page XXIII (in Supplement in NRA archives)
13 Comp. Gen. 132 (A-51738)

(**) Appendix No. 1, Page XXXII (in Supplement in NRA archives)
13 Comp. Gen. 181 (A-50815)

and charges and to prevent unjust discrimination: Provided, That the provisions of this paragraph shall not be construed to prohibit any carrier from extending credit in connection with rates and charges on freight transported for the United States, for any Department, Bureau, or Agency thereof, or for any State or territory or political subdivision thereof, or for the District of Columbia."

In the Atchison, Topeka and Sante Fe Railroad case, Justice Van Devanter delivered the opinion of the court, the pertinent part of which is as follows:

"Under a provision (207) in the Interstate Commerce Act, the United States could have arranged with the company for a different and reduced rate, if the company was so disposed (March 2, 1889, Chap. 582, 22, 25 Stat. at Large 862, Comp. Stat. 8595, 4, Fed. Stat. Anno. 2d Ed. Page 540;) but that was not done. In the absence of such an arrangement, the company's duty to the United States was merely that of serving it at rates no higher than those applied to individuals for like transportation, (July 27, 1866, Chap. 278, 5, 14 Stat. at Large 295), less any lawful land-grant deduction."

25 Statute at Large 862, in pertinent part, reads as follows:

"22. RESTRICTIONS: INTERCHANGEABLE MILEAGE OR SCRIPT. (1) Restrictions. Nothing in this Chapter shall prevent the carriage, storage or handling of property free or at reduced rates for the United States, State or Municipal Governments....."

It would appear that since the Interstate Commerce Statute cited by the Comptroller General, as well as the statute cited by the court in the Atchison, Topeka and Sante Fe case provided by specific exemptions that credit may be extended to the United States and that the United States may make arrangements for free or reduced rates with carriers, that in the absence of such specific exemptions by Statute, the contrary would be the case. The general rule would thus appear to be that the United States is not exempt from fixed tariff rates unless specific exemption as in the instant cases, has been made, and as no such specific exemption was made under the National Industrial Recovery Act, it appears reasonable to assume that no such exemption of the United States from pricing and marketing provisions of codes was contemplated or intended. However, as no cases involving such holdings of the Comptroller General ever reached the courts, the legality of his holdings remain moot.

4. COMPTROLLER GENERAL (A-51737) (A-51738)

The much publicized so-called Ford cases appear to have been the result of Administrative misinterpretations of the requirements of the Executive Order, i.e., the necessity of bidders and contractors becoming parties to the P.R.A., the Automobile Code and the Motor Vehicle Retailing

Code. The Comptroller General, under date of November 10, 1933, in reply to a letter from the Secretary of Agriculture, as to whether the Northwest Motor Company's (a Ford Dealer) bid should be rejected because the Ford Motor Company had not affirmatively assented to or signed the Automobile Code, replied in part as follows:

> "There appears nothing in the Code for the Automobile Manufacturing Industry nor in the Act of June 16, 1933, supra, pursuant to which said Code was adopted and approved, to require that persons or firms engaged in the Industry signed or otherwise affirmatively signified their assent to the Approved Code. On the contrary, it seems clear from the plain terms of said Act and the procedure under which codes are prepared and approved, that no such signing or affirmative assent is necessary.
>
> "There is likewise for observing that there appears nothing in the Code for the Motor Vehicle Retailing Trade to require that persons or firms engaged in such Industry sign or otherwise affirmatively signify their assent to such Code.
>
> "The fact that the Ford Motor Company may not have signed assent to the Code of its Industry and indicated that it intends to comply with the provisions of said Code seem not controlling here. Until it is established that one subject to a duly approved Code of Fair Competition has violated its provisions, it is to be assumed, as is the rule respecting any law, that the provisions of the Code will be duly observed." (*)

The Comptroller General, in a similar case, under the same date, advised the Secretary of Commerce that:

> "It is to be presumed, however, that all Members of an Industry or Trade for which a Code of Fair Competition has been approved by the President will comply with the provisions thereof, and the mere fact that any such Member has not pledged compliance should not preclude the awarding of a contract to such Member, if the lowest bidder and otherwise acceptable." (**)

Under date of November 23, 1933, the Secretary of Agriculture wrote the Comptroller General that he was in receipt of a letter from the Administrator of the NRA, dated November 15, in which his Department was advised that, "to the extent of the Administration's information, the Ford Motor Company has, save in respect of certain technical particular,

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(*) Appendix No. 1, Pages XVII-XXIII (in Supplement in NRA archives) 13 Comp. Gen. 127 (A-51737)

(**) Appendix No. 1, Page XXV (in Supplement in NRA archives) 13 Comp. Gen. 132 (A-51738)

which are considered immaterial, complied satisfactorily with the Code of Fair Competition for the Automobile Manufacturing Industry. To that extent the Department would appear to be authorized, under your decision, to award the bid to the Northwest Motor Company of Bethesda, Maryland, except for the fact that the Administrator now raises the further question as to the probable violation by the Northwest Motor Company of Article IV-B, Sections 1 and 2 of the Motor Retail Code, for the reason that the bid of the Northwest Motor Company of Bethesda, Maryland, if that company's bid is in fact below the minimum set by the Motor Vehicle Retail Code."

In reply to these points the Comptroller General advised the Secretary of Agriculture in part as follows:

> "The bid as made is a responsibility of the bidder. Under the provisions of Section 3709, Revised Statutes, contracts for supplying the needs of the various activities of the Government, except as otherwise specifically provided by law are required to be awarded to the lowest responsible bidder after proper advertiseing: and while such contracts may contain suitable provisions relative to compliance with applicable Codes in the performance thereof and to the action to be taken under the contract in the event of non-compliance therewith, the applicable appropriation would not be available for payments under a contract awarded to other than the lowest responsible bidder because of any assumption or Administrative determination that the price quoted by the low bidder was so low that the bidder violated a Code in submitting such bid.
>
> "The question as to whether a bidder violated some Code approved pursuant to the provisions of Section 3, of the National Industrial Recovery Act and thereby became subject to the fine prescribed in Paragraph (f) of said Section is for judicial determination and not for consideration by the purchasing or contracting officer in the awarding of a contract." (*)

It can be readily seen from all of the above rulings of the Comptroller General, that the intent of the Executive Order was so nullified and weakened that it became immediately necessary for a new Executive Order to be written which would circumvent the Comptroller's rulings as to posted prices, Marketing Agreements, etc., as well as rectify the obvious weaknesses of the Order itself.

(*) Appendix No. 1, Pages XXVI-XXVIII (in Supplement in NRA archives) 13 Comp. Gen. 159 (A-51737)

CHAPTER IV

EXECUTIVE ORDER 6646

Early in November 1933 the Assistant National Compliance Director drafted an executive order designed to supersede and strengthen the then existing Executive Order 6246 which, as has been pointed out, had all but completely failed as a compliance instrument. In January 1934, this proposed order (*) was submitted through the National Emergency Council to the Attorney General for approval and ultimate submission to the President for signature and promulgation.

The order as finally signed by the President on March 14, 1934 as Executive Order No. 6646 was substantially the same as that submitted by the NRA with the exception of several minor changes of little consequence and one major deletion. The deleted section had provided as follows:

> "6. Heads of Departments of Agencies of the United States hereby affected, shall prepae such rules and regulations as may be deemed necessary to carry out the purposes of this order and submit the same to the National Emergency Council which will coordinate the same and which shall become effective only with its approval and which may prescribe such other and further rules and regulations as may be deemed necessary to carry out the purposes of this order."

In an undated and unsigned memorandum (**), which the Assistant National Compliance Director delivered in person to and discussed with the Director of the National Emergency Council prior to the promulgation of Executive Order 6646, is the following statement:

> "The Attorney General has eliminated from the executive order the provision for the issuance of regulations to 'Effect the purpose of the order'. I am informed that his reason for this elimination was that the order was so complete and and self-explanatory that regulations would be unnecessary.
>
> "This view merely emphasizes the need of uniform regulations. Many of the Departments, uninformed as to practical NRA conditions, will reach the same conclusion as the Attorney General. Each will attempt its own interpretation resulting in confusion to the contractors and in the administration of the order."

The exhibits contained in this report which will be commented on later clearly and conclusively illustrate that the Assistant National Compliance Director's anticipated fears were well founded and fully realized.

A. LEGAL ISSUES.

It might be well at this point to give some passing consideration to the validity of restricting bidders to a certain class (Code and P.R.A. compliers) solely by Executive Authority.

The Secretary of War, on May 26, 1909, issued a circular providing that:

(*) Appendix No. 111. (In Supplement in NRA archives).
(**) Appendix No. 112. (In Supplement in NRA archives).

"No contract on behalf of the Government to be entered into directly with any corporation which has been adjudicated to be a party to an unlawful trust and monopoly."

This circular was issued in connection with a joint resolution of both Houses of Congress (34 Stat. 385) which dealt with purchases of material and equipment for the Panama Canal limiting these purchases to articles of domestic production and manufacture, to be secured from the lowest responsible bidder, unless the President deemed the bids or tenders extortionate. President Roosevelt issued an Executive Order thereunder. The Secretary of War issued his circular as to all purchases for the War Department.

The Attorney General, George W. Wickersham, set forth the test of responsibility and decided that awards hinged thereon, he wrote:

"The mere fact that a vendor of goods is a party to an unlawful trust or combination in restraint of trade would not protect him from an action to enforce a contract to sell and deliver goods. For those reasons, I am of the opinion that you cannot ignore the requirements of the joint resolution and Executive Order above referred to, to award the contract for the purchase of materials and equipment for use in the construction of the Panama Canal to the lowest responsible bidder, simply because such bidder has been adjudicated to be a party to a combination in restraint of trade in violation of the Sherman Anti-Trust Act."
28 opinions of the Attorney General, 254.

The same circular formed the basis for another opinion by the Attorney General. His opinion was requested as to whether or not, as prescribed by the circular, the adjudication that a person or corporation is a party to an unlawful trust or monopoly and is carrying on business in violation of law is sufficient to exclude such person or corporation from competition in the sale of supplies to the Government. The Attorney General expressed the opinion that:

"The right is not given to amend or enlarge the law. To restrict bidders to a certain class, or to exclude a certain class from the right to bid, is not within the provisions of any existing law. If Congress could delegate this power, it certainly has not done so by the statutes herein cited."
28 opinions of the Attorney General, 389.

In a more recent opinion the Attorney General of the United States, under date of June 21, 1934, stated:

"An Executive Officer cannot, by his regulations, alter or amend the law. All he can do is to regulate the mode of proceeding to carry into effect what Congress has enacted."

Executive Order 6646, however, was promulgated to restrict bidders to a certain class as well as to exclude a certain class from the right to bid without any specific delegation of power by Congress to the President to warrant such exclusion and restriction, unless Section 10(a) of Title I of the National Industrial Recovery Act can be construed as delegating such authority.

B. ANALYSIS OF PROVISIONS OF ORDER.

1. BID REQUIREMENTS.

Section 1(a) and (b) of the Order provides that:

> (a) "All invitations to bidders hereafter promulgated by or in behalf of any executive department or independent establishment or other agency or instrumentality of the United States, including Government-owned and Government-controlled corporations (all of the foregoing being hereafter described as agencies of the United States), shall contain a provision to the effect that no bid will be considered unless it includes or is accompanied by a certificate duly executed by the bidder stating that the bidder is complying with and will continue to comply with each approved code of fair competition to which he is subject, and if engaged in any trade or industry for which there is no approved code of fair competition, then stating that as to such trade or industry he has become a party to and is complying with and will continue to comply with an agreement with the President under Section 4 (a) of the National Industrial Recovery Act.
>
> (b) "No bid which does not comply with the foregoing requirements shall be considered or accepted."

It should be noted that the terms of the above Sections of this Order go far beyond those of Executive Order 6246 in that they require all bidders on government work, including suppoies, construction and services, to affirmatively state or certify that they are complying and will continue to comply with each approved code to which they are subject, and not merely with the code or codes applicable to the particular contract on which they are bidding, or if they are not subject to an approved code, then that they have "become a party to" and are complying with an agreement with the President under Section 4 (a) of the N.I.R.A.

While Executive Order 6246 limited compliance under its provisions to the amount of money actually expended by the Government for supplies, the above provisions of this Order extended compliance to all business operations of all firms successfully or unsuccessfully submitting bids for Federal contracts.

Section 1 (b) was drafted to circumvent an interpretation of the former Order by the Comptroller General in the George F. Driscoll Company case. (*)

2. CONTRACT PROVISIONS.

Section 1 (c) of the Executive Order Provides:

> "All contracts and purchase orders authorized by any agency of the United States shall contain a provision to the effect that the party or parties awarded any such contract or purchase order shall comply with each approved code of fair competition to which it is subject and if engaged in any trade or industry for which there is no approved code of fair competition, then, as to such trade or industry, with an agreement with the President as aforesaid; and that the United States shall have the right to cancel any contract for failure to comply with such provision and make open market purchases or have the work called for by the contract otherwise performed, at the expense of the contractor."

This Section somewhat enlarges the requirements of the similar section of the previous Order by requiring compliance with each code to which the contractor is subject, rather than the code applicable to that particular contract.

3. SUBCONTRACT REQUIREMENTS.

Section 1 (d) provides:

> "No agency of the United States and no Government contractor or supplier shall hereafter accept or purchase for the performance of any contract or purchase order or enter into any subcontracts for any articles, materials, or supplies, in whole or in part, produced or furnished by any person who shall not have certified that he is complying with each code of fair competition which relates to such articles, materials, or supplies, or in case there is no approved code for the whole or any portion thereof, then, to that extent, with an agreement with the President as aforesaid."

Any attempt to make an analysis of the literal implications of this Section would result in such a pyramid of certified compliance that it would be reduced to an absurdity. To take a specific instance, if carried out literally, this Section would require a general contractor engaged in public construction, who sublet a plumbing contract, to obtain certificates of compliance, on pipes, as far back as the metal mines that extracted the basic metals and alloys composing them, and on each other item including the red lead and hemp similar certificates would have to be obtained back to their natural sources to the extent

(*) Appendix No. 1, Pages XV -XVI(In Supplement in N.R.A. archives)
13 Comp. Gen. 121 (A-47742)

that such sources remained within the United States. The same procedure would be required for each and every item of the hundreds of items going into a single building. Fortunately, in administering this Section of the Order there is no record to indicate that such an interpretation was attempted, and in practice it is believed that only the immediate subcontractors or suppliers were required to certify their own compliance as to such articles, materials or supplies. It should be noted, however, that in spite of the fact that this Section attempted to require such extremes on one hand, it failed to make any provision as to subcontractors who furnished "services" in connection with the general contract, in addition to the furnishing of articles, materials, or supplies.

4. LOANS AND GRANT REQUIREMENTS.

Section 1 (e) of the Order provides as follows:

> "The foregoing provisions of this Order shall likewise apply to all contracts and purchase orders authorized by any State, municipal corporation, local subdivision, person, or corporation in connection with projects carried out or to be carried out, wholly or in part, with funds loaned or granted by any agency of the United States, and all contracts and agreements for the making of any such loan or grant shall contain a provision requiring the State, municipal corporation, local subdivision, person, or corporation receiving such loan or grant, to comply with the provisions of this Order: Provided, That this paragraph shall not be construed as requiring the restriction of the use of materials to those produced within the United States nor to require price differential in favor of such materials."

It can be readily seen that this Section of the Order extended its foregoing provisions to grantees and borrowers of Federal funds under several Acts including Title II, of the N.I.R.A.; the Acts created and amending the Home Owners' Loan Corporation; the Emergency Relief and Reconstruction Act of 1932 as amended, and the Federal Emergency Relief Act of 1933. The coverage of industry by this Section extended into several billions of dollars worth of work since in the majority of loans and grants the Federal Government supplied not over 30 per cent of the total funds involved.

5. PENALTIES.

Section 2 of the Order, the Penalty Section, provided:

> "Any person falsely certifying as to compliance as aforesaid who submits any such proposal, bid, contract, or subcontract, or accepts any purchase order, may be punished as provided in Section 10(a) of the National Industrial Recovery Act, by a fine of not to exceed Five Hundred Dollars ($500) or imprisonment not to exceed six months, or both, and in event of any such false certification by any such person, any contract,.

subcontract, or purchase order, to which he is party secured by or in furtherance of any such proposal or bid may be cancelled by the other party thereto, and the unfinished portion thereof completed at the expense of the person guilty of such false certification and his sureties, if any."

It should be noted that this Section goes beyond the penalty provision of Executive Order 6246 by invoking the penalties provided in Section 10(a) of the National Industrial Recovery Act. It also provided a means for terminating the contract of a person who at the time of submitting his bid was not complying or had not complied with each Code to which he was subject, but who through a falsely executed certificate of compliance was able to obtain the contract on which he was bidding.

6. PROVISIONS FOR ADMINISTRATION OF ORDER.

Section 3 of the Order provided:

"Whenever a dispute shall arise between any agency of the United States and any bidder, contractor, supplier, or other person as to compliance with any code of fair competition or with an agreement with the President as aforesaid in connection with any proposal, bid, contract, subcontract or purchase order mentioned herein; the Administrator for Industrial Recovery, or such agency as he shall designate, shall decide such dispute, and, for the purposes of action under this Executive order, such decision shall be final and conclusive; but the determination of such agency of the United States shall be effective for all purposes pending such decision."

This Section in providing an Administrative Agency delegated with sufficient authority to make final and conclusive decisions and interpretations for the purposes of action under the Executive Order, corrected one of the greatest weaknesses of the former Order. It also removed the necessity of awaiting court action to determine compliance or non-compliance on the part of alleged violations of government contractors or bidders. It moreover removed from the various agencies of the United States the responsibility of trying to interpret Code provisions in some seven hundred codes and supplements with which they were, in most cases, to say the least, unfamiliar.

7. ALL CODE PROVISIONS APPLICABLE.

Section 4, of the Executive Order provided:

"All provisions of approved codes of fair competition shall apply to the making and performance of contracts with or sales to agencies of the United States."

The intent of this Section was obviously aimed to circumvent, if possible, the Comptroller General's adverse decisions on the former Order to the effect that price filing, marketing, and price fixing provisions of codes did not apply to sales to the United States.

8. EXCEPTIONS

Section 5, of the Order provided that:

> "The Administrator for Industrial Recovery may make exceptions in specific cases or otherwise under this Order whenever such action shall be recommended to him by an agency of the United States and when in the judgment of the Administrator justice or public interest will best be served thereby."

It is quite obvious that it was anticipated that numerous cases would arise where it would be impracticable, if not impossible, to obtain the required compliance certificates, and this Section provided the necessary means for handling such situations.

Section 6 of the Order merely rescinded any provisions of Executive Orders 6246 or any other Executive Order which might be in conflict with the provisions of Executive Order 6646.

CHAPTER V

ADMINISTRATION OF EXECUTIVE ORDER 6646

A. AGENCY OF ADMINISTRATION

The first action taken by the NRA toward administering the provisions of the Executive Order as provided in Section 3, of the Order, was the issuance of NRA Office Memorandum of March 30, 1934, which directed that:

> "All inquiries as to explanation and application of Executive Order 6646 of March 14, 1934, requiring Government contracts and purchases to be made accordance with Code requirements should be referred to Mr. Frank Healy, Compliance Division, 307 Lenox Building.
>
> "All protests of bids submitted to or contracts made with Government Agencies based on Code violations, or as being contrary to Executive Order 6646, should likewise be so referred.
>
> "All applications for exemptions in the operation of Executive Order 6646, under Section 5 thereof, should likewise be so referred; a file of exceptions granted will be kept in the Compliance Division and the Code Record Section. All exceptions granted will be promulgated by the Administrator through the Procurement Division of the Treasury, which has facilities for quickly informing all purchasing and supply officers of the Government.
>
> "All interpretations of Executive Order 6646 will be made through Mr. Healy in collaboration with the Legal Division."

Under date of April 12, 1934, NRA Office Memorandum 180, provided in Section 4, as follows:

> "Frank Healy is relieved as Assistant National Compliance Director and is appointed Chief of the Government Contracts and Competition Section."

Thus the Government Contracts and Competition Section of the Compliance Division was established as an agency of the Administrator to perform the functions required by Section 3 of the Executive Order, with the exception that this unit was not delegated the final authority to recommend cancellations or dismissals of cases, which function the Administrator never relinquished or delegated.

The above mentioned memoranda were later supplemented by Office Memorandum No. 341, of March 1, 1935, which provided as follows:

> "The Government Contracts and Competition Branch of the Compliance Division is reconstituted as the Government Contracts Division of NRA. The Chief of the Division will report to the Compliance and Enforcement Director.

"The powers and duties of the Government Contracts Division are as follows:

"(a) To make decisions as to compliance or non-compliance with any Code of Fair Competition or Agreement with the President on the part of any person interested in any proposal, bid, contract, sub-contract, or purchase order within the meaning of Executive Order No. 6646, or interested in any loan or transaction whereby he is to receive directly or indirectly funds loaned, granted or expended by the United States or any agency thereof.

(b) To make exceptions under said Executive Order as provided in Paragraph (5) thereof.

(c) To make interpretations and to take such other action as may be necessary in the administration of said Executive Order.

(d) To study and recommend remedy in cases of complaints of government competition with private industry other than those assigned to Division No. 8.

(e) To study and recommend remedy in cases of Code Conflict with government purchasing practices or statutory restriction.

(f) To maintain liaison with other government agencies in connection with the matters referred to above.

"2. All matters which are identified as falling within the scope of the powers and duties of the Government Contracts Division as above set forth, will be immediately forwarded to this Division without action thereon.

"3. General interpretations and general exceptions must be transmitted to the Administrative Officer for actual approval or for review by him prior to approval by the Compliance and Enforcement Director.

"4. All other exceptions and all recommendations and decisions must be approved by the Compliance and

Enforcement Director who in his discretion may utilize the facilities of the Review Division prior or subsequent to his approval. In the absence of the Compliance and Enforcement Director the same must be approved by the Administrative Officer.

"5. The action to be taken by the Division hereunder will be in accordance with such procedure as the Compliance and Enforcement Director may direct."

The procedure established by this Memorandum remained in effect until May 27, 1935.

B. ORGANIZATION AND PROCEDURE.

1. CASE AND PERSONNEL STATISTICS

The Government Contracts Division subsequent to May 27, 1935 made a statistical survey of the 6578 complaints against government contractors and bidders which had been filed during the operation of Executive Orders 6246 and 6646. One of the compilations made in this survey discloses the following relationship between the personnel actually assigned to the examination of complaints and the number of complaints received per month.

	Date	Personnel Examining Complaints	Complaints	Average Cases Per Person
Government Contracts Branch of Compliance Division	April 1934	2	85	42.5
	May "	2	128	64.0
	June "	3	236	78.6
	July "	3	201	67.0
	August "	3	240	80.0
	September "	4	268	67.0
	October "	4	292	73.0
	November "	7	351	50.0
	December "	9	415	46.0
	January 1935	11	537	48.7
	February "	13	511	39.4
Government Contracts Division of NRA	March "	20	628	31.0
	April "	23	939	40.7
	May "	25	1,164	46.5

(*) 502 cases showed no date of receipt.

The above tabulation shows that the average number of complaints per month handled by each individual assigned to cases varied from 31 in March 1935 to 80 in August 1934 and that during the period from May 1934 through October 1934 the personnel was inadequate to handle the volume of complaints being filed.

Another compilation in this survey, designated Table No.3, shows that of the 7579 separate alleged violations 49% were for the following three reasons:

	No. of Alleged Violations	Percent
Failure to file prices	1,568	21
Selling below filed prices	1,291	17
Failure to pay code assessments	834	11

This same compilation further shows that 68% of the separate alleged violations were filed by or through code authorities and 17.5% by competitions. The remaining 14.5% were received from various sources.

The variation between the number of respondents, viz., 6578 and the 7579 alleged violations is accountable to the fact that in many instances several specific alleged violations were made against one respondent.

Table No. 4 of this survey indicates that 6578 respondents were alleged to have violated or been in violation of their code or the PRA in 1941 biddings and on 2320 contracts. 80% of the total number of respondents were on bids or contracts with the following six governmental agencies.

	No. of Alleged Violations	Persent
Agriculture (including Bureau of Public Roads)	340	5.1
Federal Emergency Relief Administration	2,273	34.5
Navy Department	386	5.9
Public Works Administration	823	12.5
Treasury Department	570	8.7
War Department	911	13.8
		80.5

The remaining 20% were on bids and contracts with twenty or more other agencies.

The following compilation shows the disposition of the 6578 complaints received by the Government Contracts Division.

DISPOSITION OF CASE

Sustained No Recommendation		116
Contract Cancellation Recommended		285
Bid Rejection Recommended		286
Bid Rejection or Contract Cancellation Recommended		435
Dismissed (for following reasons)		3,493
Insufficient Evidence	556	
Contract Completed	995	
No United States Funds	145	
No Violation	918	
No Award to Respondent	509	
All Bids Rejected	53	
Reason for Dismissal Not Shown	94	
Respondent Withdrew Bid	10	
Complaint Withdrawn	85	
Assessment Paid	35	
No Jurisdiction	35	
No Complaint Alleged	5	
Other Reasons	29	
Inquiries	7	
Pending May 27, 1935		1,963
TOTAL		6,578

2. PROCEDURE

Complaints alleging false certification and Code violation on the part of government bidders and contractors originated in general from the following sources: competitors, employees and code authorities. These complaints were filed in several ways; a competitor might file a complaint with the purchasing officer of the department or agency involved, or he might file it through his code authority, or the local or State NRA Compliance Office or directly with the Government Contracts Division. Not infrequently, complaints were filed directly with deputies and assistant deputies of the Industry Division.

Labor complaints involving government contracts were, in general filed directly with the LRA either through local or state offices or directly to Washington.

Code Authorities, in general, submitted two types of complaints, one at the request of members of their industry against other competitors, the other on its own behalf because of failure or refusal of members of their industry to pay code assessments, furnish statistics, reports, etc., as required by code provisions.

When a complaint eventually found its way to the Government Contracts Division, it was docketed and the respondent was notified of the nature of the complaint and given an opportunity to present his

side of the case or refute the allegations made against him. Opportunity was then given the complainant to substantiate his charges or accusations and submit additional evidence, when necessary or advisable.

It then became the responsibility of the attorney or examiner assigned to the case to form an opinion from the facts submitted as to whether there was or was not a violation as alleged, or whether additional facts were needed from either the complainant or respondent. Decisions of attorneys and examiners, both as to sufficiency of facts and conclusions, were reviewed by their superiors during the progress of the case as well as when it was completed and ready for submission to the Administrator.

During the period of investigation, the Government Contracts Division called freely upon State and regional offices, as well as other Governmental agencies for field investigation. Not infrequently, these agencies were requested to withhold awards pending investigation and subsequent recommendations of the Government Contracts Division.

When the evidence was considered complete the entire file on the case was transmitted to the assistant deputy or deputy administrator in charge of the applicable code, both for his opinion and the opinion of his legal adviser. While these opinions were entitled to and did receive weight in arriving at a decision in the case, the Government Contracts Division reserved the right to make final decision prior to submission to the Administrator or the N.I.R.B.

Upon the completion of a case it was signed by the Chief of the Government Contracts Division and submitted to the Administrator or the N.I.R.B. for approval. The Administrator never delegated authority to anyone to give his approval on recommendations, however, the N.I.R.B. delegated its authority first to the Administrative Officer and later to the Compliance and Enforcement Director.

The formal recommendation as approved by the Administrator, or N.I.R.B., was then formally transmitted to the head of the Government Agency in question for whatever action he desired to take. Such action by the terms of the Executive Order was left wholly to the discretion of the head of each Governmental agency.

C. EXCEPTIONS TO 6646.

During the period of administration of Executive Order 6646, a total of eighty-six exceptions from its provisions were promulgated under the provisions of Section 5 of the Order. All exceptions were granted as the result of recommendations of governmental agencies, sixty-six of which related to specific transactions and the remaining twenty were general in nature to cover situations or classes of contracts. Probably the furthest reaching ones in the latter class were Exceptions No. 5 and 20 permitting emergency and open market purchases under Fifty ($50) Dollars in the former and One Hundred ($100) Dollars in the latter case to be made without obtaining certificates

of compliance, where their obtainance was not practicable or possible.

D. DIFFICULTIES IN ADMINISTRATION.

The difficulties in administering Executive Order 6646 were many, but can be divided into two general classes, mechanical and technical. Under the former there was the vital element of time, that is, the time from the filing of a complaint to the time of submission of a formal recommendation by the NRA to the department involved. This element, in numerous cases gave a member of industry violating a code sufficient time to make complete delivery on his contract and obtain full payment for same, thus completely circumventing the purposes of the Order. The contributing factors to such delays were many, and included the insufficiency of personnel actually handling the cases in the Government Contracts Division and the insufficiency of evidence presented by the complainants, who, in many instances known to the author were business men with little knowledge or understanding of what constituted pertinent or relevant evidence or facts necessary to substantiate their accusations. Their complaints were usually ultimate conclusions of law, i.e., that the respondent was in violation of the code, rather than sufficient facts to logically arrive at such conclusion.

Another major difficulty was presented by the Codes themselves, which were in effect statutes, and therefore, had the force and effect of law. These codes, however, were written by men with little or no experience in writing law and were in many instances the results of a series of compromises made under both economic and administrative pressure. The results of such compromises were often code provisions which were neither definite nor precise.

The problem thus presented to the Government Contracts Division was whether such provisions should be interpreted to "save the code" by reading into them what was not there, or whether they should be interpreted to protect the Government from claims, damage suits, and injunctions which might arise from contract cancellations based on stretched interpretations of faulty code provisions.

The punitive effect of the Order was further immeasurably weakened by the fact that the decisions of the Government Contracts Division and the NRA were made in the form of recommendations which, it is safe to assume, in many instances were not enforced, thereby defeating the effectiveness of the Order.

E. EXECUTION OF ORDER BY GOVERNMENT AGENCIES.

It is impostant in this study to review the manner in which the Government Agencies and Departments, especially the leading and granting agencies, carried out the provisions of Executive Order 6646, and also to examine the precise regulations, forms, instructions to field offices, certificates of compliance and contractual clauses employed for that purpose.

1. P.W.A.

First to be considered is the Federal Emergency Administration of Public Works, commonly known and referred to a P.W.A., which under Executive Order 6246, had issued Bulletin No. 51, "Information Relating to the Negotiation and Administration of Contracts for Federal Projects under Title II of the National Industrial Recovery Act", (*) also Bulletin No. 2 of September 12, 1933, (**) which was superseded by Bulletin No. 2, revised March 3, 1934, entitled "P.W.A. Reguirements as to Bids, Contractors, Bonds, and Contracts, Wage and Labor Provisions and General Instructions as to Applications and Loans and Grants" (***); P.W.A. 61, "Certificate of Compliance with N.R.A. in Connection with P.W.A. Projects", (****); and P.W.A. No.51, United States Form of Contract.(*****)

These bulletins and forms were respectively superseded and revised to meet the requirements of Executive Order 6646 by Bulletin No. 51 (revised December 1, 1934) (******); by an addendum dated May 28, 1934 to Bulletin No. 2, (*******); and latter in Bulletin No. 2, revised March 1, 1935, (********); by P.W.A. 61 for non-Federal projects, (revised March, 1934 (*********); and P.W.A. 61-F, for Federal projects (revised March, 1934) (**********); and P.W.A. 51, (Revised July 18, 1934).

It should be noted in these forms that here again, (under Executive Order 6646) as under the preceding order, P.W.A. went beyong the terms of the Executive Order by requiring that subcontractors and material men execute P.W.A. 61 (revised March, 1934),(***********)

(*) Appendix No. 3. (In Supplement in NRA archives)

(**) Appendix No. 4. (In Supplement in NRA archives)

(***) Appendix No. 9. (In Supplement in NRA archives)

(****) Appendix No. 5. (In Supplement in NRA archives)

(*****) Appendix No. 2. (In Supplement in NRA archives)

(******) Appendix No.19. (In Supplement in NRA archives)

(*******) Appendix No. 9. (In Supplement in NRA archives)

(********) Appendix No.28. (In Supplement in NRA archives)

(*********) Appendix No.10. (In Supplement in NRA archives)

(**********) Appendix No.10-A(In Supplement in NRA archives)

(***********)(In Supplement in NRA archives)
Appendix No. 9, Page 7.
Appendix No.19, Page 8.
Appendix No.39, Page 11-7.
Appendix No.37, Page 6.

which required certification of compliance with each code to which he was subject, while the Executive Order, Section 1 (d), only required certification of compliance "with each code of fair competition which relates to such articles, materials, or supplies" as the subcontractor or supplier was furnishing. These compliance certificates (P.W.A. 61) were not only used by the Federal Emergency Administration of Public Works, but also by other governmental agencies and departments, as well as States, municipalities, and others using P.W.A. funds through loans, grants and allotments.(*)

Practically all P.W.A. forms of contract, instructions to field officers, etc., used during the terms of Executive Orders 6246 and 6646 may be found in the Appendix from Appendix No. 2 to Appendix No. 40, inclusive.

2. F.E.R.A.

The Federal Emergency Relief Administration, soon after promulgation of Executive Order 6646 issued "F.E.R.A. Manual Advance Bulletin No. 2" (**) to all State Emergency Relief Administrations and State Civil Works Administrations, entitled "purchasing and voucher procedure". Item No. 4 of this bulletin provided as follows:

"Compliance with N.R.A. Codes:

"All bidders and vendors if paid with federal funds are required to sign a certificate of compliance with Codes of Fair Competition, such as follows: "It is hereby certified that the undersigned is complying with and will continue to comply with each approved Code of Fair Competition to which he is subject and/or if engaged in any trade or industry for which there is no approved Code of Fair Competition than as to such trade or industry he has become a party to and is complying with and will continue to comply with an agreement with the President under Section 4 (a) of the National Industrial Recovery Act, (President's Reemployment Agreement) and that all other conditions and requirements of Executive Order No. 6646, dated March 14, 1934, are being and will be complied with.

"Provided, That where supplies are purchased that are not mined, produced, or manufactured in the United States. . . . . ".

It should be noted that this certificate only required, by reference, that the provisions of Section 1 (d) of the Executive Order be complied with. These instructions were soon found to be unsatis-

(*) (In Supplement in NRA archives) Appendix No. 14. Appendix No. 38, Page 6. Appendix No. 20, Page 4. Appendix No. 30-A. Appendix No. 39, Page II-7. Appendix No. 40, Page II-8.

(**) Appendix No. 45. (In Supplement in NRA archives)

factory, and on March 26, 1934, "F.E.R.A. Manual Advance Bulletin No.3(*) was sent to all State E.R.A.'s and State C.W.A.'s entitled "Grants and Disbursements of E.R.A. Funds," Item 1, of which states in part: "Grants of F.E.R.A. funds will be made to the States from time to time by the Federal Relief Administrator following the receipt of formal applications from the Governor of the State."(**) Item 7 of the Bulletin provided as follows:

"Compliance With Executive Order No. 6646.

"Under date of March 14, 1934, the President of the United States issued Executive Order 6646, which requires that all disbursements for materials, supplies, etc., from Federal funds or from grants of Federal funds must be made only for purchases from vendors who a are complying with approved Codes of Fair Competition, or in the absence of a Code then complying with the President's Reemployment Agreement under Section 4 (a) of the National Industrial Recovery Act.

"According to the terms of this Executive Order, its provisions shall likewise apply to all contracts and purchase orders authorized by any State, Municipal Corporation, local Subdivision, person or corporation, in connection with projects carried out or to be carried out, wholly, or in part, with funds loaned or granted by any Agency of the United States'. Therefore, before payments may be made out of E.R.A. funds, vendors must submit the certificate of compliance F.E.R.A., Form 163.

"The purchasing and auditing sections of the E.R.A. must ascertain that this certificate is obtained."

The vendor certificate, F.E.R.A., Form 163, (***) required certification that "the contractor is complying and will continue to comply with each approved code of fair competition to which he is subject, etc.," but here again no provision was made for subcontracters, or suppliers of the vendor as required by Section 1 (d) of the Executive Order.

The deficiency of Bulletins No. 2 and 3, in failing to re-

(*) Appendix No. 46. (In Supplement in NRA archives)

(**) Appendix No. 48. (Application Form) (In Supplement in NRA archives)

(***) Appendix No. 46, Page 4. (In Supplement in NRA archives)

quire compliance of subcontractors as required by the above mentioned Section of the Executive Order appears not to have been corrected until November 14, 1934, when Communication No. 4040 was distributed to all State Relief Administrations (*) and required certificates of compliance from not only persons honoring relief purchase orders, but also special certificates from persons "producing or furnishing materials or supplies covered by such purchase orders."(**) The latter certificate, (***) however, as in P.W.A. 61, when applied to subcontractors and sub-suppliers, went beyond the requirements of the Executive Order in that it required compliance with "each code to which he was subject" rather than compliance with "each code.....which relates to such articles, materials, or supplies". Whereas the above requirement went beyond the terms of the Executive Order, the following excerpts of the same certificate fell short of the requirements of the Order," .....if engaged in a trade or industry for which there is no approved code of fair competition, then as to such trade or industry with an agreement with the President under Section 4 (a) of the National Industrial Recovery Act (President's Reemployment Agreement)", in that they did not require that the "undersigned" had "become a party to, ... an agreement with the President.....", which condition had been included in the vendor's certificate F.E.R.A. Form 163.(****)

3. R. F. C.

The Reconstruction Finance Corporation, a Federal lending agency, inserted in its loan applications the following clauses to conform with Section 1 (e) of the Executive Order: (R. F. C. Form 11-198, Clauses 1 and 18: (*****)

> "(1) To induce R.F.C. to make such loan, applicant represents, warrants and agrees as follows: (1) Applicant is complying and shall continue to comply with all provisions of the approved Code or Codes of Fair Competition (and of all applicable regulations and Executive Orders) for the type of operation being conducted by applicant,

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(*) Appendix No. 46, Page 4. (In Supplement in NRA archives)

(**) Appendix No. 49. (In Supplement in NRA archives)

(***) (In Supplement in NRA archives)
Appendix No. 50 - 51.
Appendix No. 51

(****) Appendix No. 46, Page 4. (In Supplement in NRA archives)

(*****) Appendix No. 43, Pages 1 - 3. (In Supplement in NRA archives)

or for the subdivision or subdivisions thereof concerned; or, if there be no such approved Code, has signed, and has complied and is complying, and shall continue to comply with the provisions of, the President's Reemployment Agreement (and of all applicable regulations and Executive Orders) promulgated under authority of Section 4 (a) of the National Industrial Recovery Act, and/or any other Agreement promulgated by the President under the National Industrial Recovery Act."

It should be noted that this clause required applicants for loans to certify compliance for their own operations, a condition not required or contemplated by the terms of the Executive Order.

"(18) So long as applicant shall remain indebted to R.F.C., applicant will comply with the provisions of the Executive Order of the President of the United States, dated March 14, 1934, by agreeing that, during the term of indebtedness: (a) All contracts and Orders by the applicant, or by his general contractor, if any, for machinery, articles, materials, or services, to be acquired, in whole or in part, with any of the proceeds of the loan, shall require, before performance or delivery, a certificate signed by the party awarded such contract or Order, and by all concerns supplying, directly or indirectly, the aforesaid machinery, articles, materials, or services, and all invitations for bids, for machinery, articles, materials, or services, to be acquired in whole or in part, with any of the proceeds of the loan, shall require the bid to contain a certificate by the bidder and an agreement by the bidder to obtain a certificate from all concerns supplying, directly or indirectly, the aforesaid machinery, articles, materials, or services, that the parties signing such certificate is complying with each approved Code of Fair Competition to which it is subject, and, if engaged in any trade or industry for which there is no approved Code of Fair Competition, a certificate as to such trade or industry it has become a party to, is complying with and shall continue to comply with the Agreement of the President under Section 4 (a) of the National Industrial Recovery Act, and/or any other Agreement promulgated by the President under the National Industrial Recovery Act; and

"(b) Each such contract, order, or invitation for bids shall provide that the applicant or his general contractor, as the case may be, and this Corporation, shall have the right to can-

cel such contract or order, or the contract or order executed pursuant to such invitation for bids, upon non-compliance with the provisions of the aforesaid certificate, and to make open market purchases, or have the services called for, otherwise performed, at the expense of the party to whom the contract or order has been awarded; and

"(c) The applicant will accept no such machinery, articles, materials, or services pursuant to such contract, order, or invitation for bids, unless each of the aforesaid certificates has been furnished."

Here again the R.F.C., as did the P.W.A. and F.E.R.A., required code compliance of subcontractors and sub-suppliers with "each approved code of fair competition to which it is subject" rather than compliance "with each code of fair competition which relates to such articles, materials, or supplies"....." the clause also required, "concerns supplying..... services" to certify compliance, a requirement which had been overlooked or not contemplated by the Executive Order. Similar clauses were also included in R.F.C. Form 11-174, clause (2) and (20) (*).

R.F.C. Form S 18 (**) which provided "It is hereby certified that the undersigned is complying with and will continue to comply with each approved code of fair competition to which he is subject....." was required to be signed and submitted by all bidders with all bids involving expenditures of government funds whether on Federal or non-Federal projects, and similar certificates were required to be executed by bidders, sub-contractors and suppliers. Here again the R.F.C. form went beyond the terms of the Executive Order, whereas, in their form R.F.C. S-22(***), the requirements were less than those of the Executive Order in that they did not require contractors not subject to approved codes to be a "party to" and agreement with the President under Section 4 (a) of the National Industrial Recovery Act, but merely required that they "comply".

4. H.O.L.C.

The Home Owners' Loan Corporation, Reconditioning Division, inserted the following article in its Form R 4 A, "Reconditioning Agreement" (****) to conform with the requirements of Section 1 (e) of the Executive Order:

(*) Appendix No. 44, p.1-3. (In Supplement in NRA archives)

(**) Appendix No. 41. (In Supplement in NRA archives)

(***) Appendix No. 42. (In Supplement in NRA archives)

(****) Appendix No. 53. (In Supplement in NRA archives)

"Article 7. The contractor agrees that all materials used, and those furnishing same, shall be from those conforming to, and all labor employed shall be in conformity with, all provisions of the applicable approved Codes of Fair Competition for the trade or industry or subdivision thereof concerned, or, if there be no Code of Fair Competition for the trade or industry or subdivision thereof concerned, then such other governing regulation of the NRA;

"Provided, however, that where supplies are not mined, produced, or manufactured in the United States, the special or general Code of Fair Practice will apply to that portion of the contract executed within the United States."

It should be observed that the contractor himself was not required to comply with "each approved code of fair competition, etc., "as set forth in Section 1 (c) of the Executive Order. He was only required to agree that "all labor employed shall be in conformity with all provisions of the applicable approved Codes of Fair Competition." Trade Practice provisions of Codes were given no consideration by the provisions of this article.

Form R 4 B (*) used by the Reconditioning Division as an agreement with the contractor and the HOLC contains the following clause:

"THE CONTRACTOR AGREES:

5. To see that all materials used and furnished, and all labor employed both skilled and unskilled, shall be obtained from persons conforming to the respective applicable codes, or other governing and effective regulations approved by the NRA;"

This clause did not require compliance in any form on the part of the contractor himself, he was only required "to see that..... all labor employed.....shall be obtained from persons conforming to..... codes"; a requirement which in itself is meaningless and has no relation to the requirements of the Executive Order.

The "Owner-Corporation Agreement" Form R 4 C (**) imposed no condition on the borrower as required in Section 1 (e) of the Executive

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(*) Appendix No. 54. (In Supplement in NRA archives)

(**) Appendix No. 55. (In Supplement in NRA archives)

Order.

Form R 5 "Agreement by Owner to Perform Own Work (*) contains a provision requiring the home owner to agree to purchase his materials from those conforming to applicable NRA codes, a condition not included within the requirements of Executive Order 6646.

Form R 15 "Contractors Application" (**) contains the following clause: "Do you agree to comply with the application governing work of this character as approved by the National Recovery Administration?"

(*) Appendix No. 57. (In Supplement in NRA archives)

(**) Appendix No. 58. (In Supplement in NRA archives)

5. WAR DEPARTMENT

The Adjutant General's office on March 26, 1934, issued an instruction circular entitled "Codes and Marketing Agreements" to all corps Area and Department Commanders, except the Philippine Department; Commanding Officers of Exempted Stations; Chiefs of Supply Arms, Services and Bureaus, including the Chief of Finance and the Chief of the National Guard Bureau.(*) This circular revoked Circular No. 44 dated October 12, 1933; Section IV and Section V Circular No. 53 dated October 19, 1933; Section I Circular No. 1 dated January 8, 1934 and Section I Circular No. 4 dated February 8, 1934, (**) which had been issued pursuant to Executive Order 6246. In setting forth the application of Executive Order 6646 the circular stated that it applied to "all supply contracts and construction contracts, formal or informal; open market purchasers and cash transactions." However, it failed to state that it included contracts for services such as power, light, telephone, cleaning, etc.

The instructions contained in this circular were supplemented by:

AG 400.13 I. R of April 6, 1934
AG 400.13 I. R of April 12, 1934
AG 400.13 I. R of April 24, 1934
AG 400.13 I. R of May 1, 1934
AG 400.13 I. R of May 10, 1934

The latter in Section 2 stated:

> "The provisions of Executive Order 6646 dated March 14, 1934 are applicable to the sale of surplus and salvage property by the War Department agencies, and the provisions of that order will be complied with in connection with sale of such property."

This instruction was later overruled by the Comptroller General in a ruling addressed to the Secretary of Agriculture dated May 16, 1934 in which he stated:

> "As to your question (4), you are advised that Executive order of March 14, 1934 does <u>not</u> apply to the sale of surplus, obsolete, etc. material:"

Whether the Executive order was intended to cover the sale of surplus and obsolete government property is not known; however, the very terms of Section 1 (a) and 1(c) of the order would appear to refute the contrary and unsupported statement of the Comptroller General. Section

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(*) Appendix No. 66. (In Supplement in NRA archives, also in Addendum)

(**) Appendix No. 60 to 65 inclusive. (In Supplement in NRA archives, also in Addendum)

1(a) provides that "all invitations to bidders--shall contain a provision to the effect that no bid will be considered unless it includes or is accompanied by a certificate, etc." Persons bidding to buy from the Government are "bidders" in the same sense as persons bidding to sell to the government. The Executive Order fails to exclude persons bidding to purchase government property, therefore, the general term "bidder" would certainly appear to cover both classes. Further Section 1(c) provides that:

> "All contracts and purchase orders authorized by any agency of the United States shall contain a provision to the effect that the party or parties awarded any such contract or purchase order shall comply with each approved code of fair competition, etc."

It cannot be argued that the word "contracts" only means contracts to buy and excludes contracts to sell.

On June 21, 1934 and instructions circular was issued by the Adjutant General's office revising and compiling all instructions then in effect relating to NRA codes and AAA marketing agreements as affecting War Department procurement procedure.(*) Among other things it contained the Comptroller General's ruling regarding the dale of surplus or salvage property.(**) This circular was from time to time amended by 17 supplementary circulars which contained exceptions and other pertinent information and instructions.(***)

As a whole these circulars issued by the War Department through the Adjutant General's office seem to have had a clearer picture of the NRA and to have deviated less from the exact terms of Executive Order 6646 than similar instructions issued by any other government department or agency whose forms have been collected for this study.

F. PARAMOUNT CASES ARISING

1. NORTHWEST MOTOR COMPACT CASE

Again as under the previous Order the first case of major importance to arise was that of the Northwest Motor Company of Bethesda, Maryland, a Ford agent. In response to an advertisement of the Department of Commerce, dated March 30, 1934, the Northwest Motor Company submitted a bid, conditioned by the mimeographed letter as follows:

> "There will be no subcontractors in connection with any contract bidder may engage in under this bid, and no manufacturer will in anywise be a party to any such contract. The bidder is submitting this bid entirely upon its own responsibility and nothing contained herein, or in the bid filed herewith or the alternate bid filed herewith, is in any manner or degree binding on the Ford Motor Company, a Delaware

(*) Appendix No. 72 (In Supplement in NRA archives, also in Addendum.
(**) Appendix No. 72, Section 4 (c) (In Supplement in NRA Archives, also in Addendum)
(***) Appendix No.78 to 89 inclusive.(In Supplement in NRA archives also in Addendum).

corporation. The Northwest Motor Company has no authority, expressed, inferred or implied, to act for or bind the Ford Motor Company.

"The bidder is a member of the N.R.A., has complied, is complying, and will continue to comply with all its lawful provisions. It can make no representations respecting any of the various manufacturers who have any part in the manufacture of materials and equipment offered in this bid, and cannot bind itself that all of such manufacturers are complying. Bidder has no means of knowing whether or not they are, and such a requirement would be unfair and unjust. The law has means of enforcement and bidder cannot contract with the Government to see that the law is enforced; it can make assurances only insofar as they relate to the bidder, and such certificate as bidder executes will relate only to bidder.

"In view of the Executive Order 6646, dated March 14, 1934, bidder has submitted its bid. In connection with said Executive Order bidder feels it is subject to the following interpretation, and if, and only if, such interpretation is confirmed by competent authority, then bidder submits for consideration its alternate bid. The alternate bid is submitted under the following interpretation:

"1. That bidder is required to submit certificate of compliance only insofar as it relates to bidder.

2. That requirement that bidder furnish certificate on the part of the 5,000 or more manufacturers whose products go to make the component parts that constitute a motor vehicle of the type bidder proposes to furnish under this bid is impractical, unfair, unjust and against the interests of the Government and all qualified bidders, and is repugnant to the statutes governing Government purchases, and, therefore, is not a lawful requirement.

3. Bidder recognizes as controlling rulings of the Comptroller General of the United States that general language in a code respecting discounts does not apply to the Government, and, therefore, in quoting the Government, bidders may quote less than full list price without violating the Code of Fair Competition

> for the Motor Vehicle Retailing Trade. If this interpretation of bidder is not accepted by competent authority, then bidder protests the consideration of any bid received from any bidder quoting less than list price. Article IV of Code of Fair Competition for the Motor Vehicle Retailing Trade states, "No dealer shall sell a new car at retail to a consumer for less than factory list price **********"; therefore, any sale to the Government, a consumer, is a retail sale and all bids at less than list price would be in violation. Any seller to the Government -- whether he be manufacturer or otherwise -- is engaged in retailing when he sells to the Government, and, therefore, is subject to the provisions of the Code.

"Bidder takes the further position that there being nothing in the National Industrial Recovery Act making codes of fair competition under such Act applicable to the Federal Government, there is no authority contained in said act to make such codes applicable, either by inference or by Executive action. Any attempt to do so would be an invasion by the executive of the legislative branch of the Government, and, therefore, would be void. To assume that codes promulgated under the Act are applicable to the Federal Government would result in the creation of two classes of bidders on automotive equipment desired by the Government, as manufacturers would attempt to bid under one code and the dealers would attempt to bid under another. This would give the manufacturers an unfair advantage, contrary to the principles set forth in Section 3 of the Act, and also contrary to public policy. Such an attempt to make these codes applicable to the Federal Government would lead to the inevitable conclusion that no bidder, manufacturer, or dealer could offer automotive equipment to the Government at less than list price. Any attempt by Executive action to restrict fair and open competition in the bidding on Government purchases is repugnant to the statutes covering Government purchases and is void. Further, any attempt to set up an agency for the purpose of determining whether or not any bidder is complying with the law, or any code that has the force of law, is an invasion of the judiciary and contrary to the Act, and, therefore, is void.

"Delivery will be made in accordance with the schedule filed with this bid, unless delayed for unforeseeable causes beyond the control of the manufacturers of the parts, equipment, and vehicles offered in this bid, and without their fault, and negligence, including, but not restricted to, act of God or the public enemy, acts of the Government, fires, floods, epidemics, quarantine restrictions, strikes, and freight embargoes, which affect the manufacturers of any of their suppliers of parts, materials, or labor for their parts, vehicles, or equipment proposed in this bid, and bidder subjects itself to no penalties for delays occasioned by any of the foregoing.

"Bidder in its affidavit to disbursing officer will aver that all supplies furnished under such contract have, to the best of its knowledge, information, and belief, been produced in strict compliance with such code or agreement, as the case may be, and payment shall be made upon such averment."

The Comptroller General, under date of May 16, 1934, advised the Secretary of Commerce, in pertinent part as follows:

"It is obvious that the bid so submitted is not responsive to the advertised specifications, in that the certificate, as so qualified, proposes to disregard the requirements of Sub-section (d) of Section 1 of the Executive Order, by submitting in lieu of the certificates of said Subsection required, the bidders affidavit based upon information and belief.

"Accordingly, you are advised that the proposal submitted by the Northwest Motor Company is not for consideration."

This rejection of the Northwest Motor Company's bid was followed by a similar rejection, as a result of the ruling of the Comptroller General to the Secretary of Agriculture, dated May 16, 1934, which stated in part as follows:

"Based on the statutes and regulations quoted or referred to therein, you are advised that your question (1) is answered in the affirmative; that is, that such bid is not for consideration as not responsive to the terms of the specifications. While it is unnecessary to answer question No. 2 with respect to the bid submitted by the Northwest Motor Company, you are advised, generally, in answer to questions (2) and (3) that where the required certificate is furnished, no bid is for rejection because of a belief or assumption that the price submitted is in violation of a code."

The question No. 1 referred to in the above quotation is as follows:

> "Is the amendment of the Northwest Motor Company of the standard certificate of compliance of such a character as to render the bid of said company not for consideration?"

These rulings of the Comptroller General, together with administrative action taken thereunder, resulted in the Northwest Motor Company filing two bills of complaint in the District Supreme Court on May 24, 1934, viz., namely, the Northwest Motor Company, Plaintiff, vs. Henry A. Wallace, Defendant, and the Northwest Motor Company, Plaintiff, vs. Harold L. Ickes, Defendant. On May 19, 1934, a temporary restraining order was signed by Justice O'Donoghue, restraining the defendants from rejecting the plaintiffs' bid and on May 24, 1934, when the motion to dismiss the bill was heard, Justice O'Donoghue stated, in substance, as follows:

> "In view of Executive Order 6646 of March 14,1934, Federal Agencies cannot be compelled to buy products from manufacturers not certifying compliance with the applicable NRA Code, even though such products are supplied through the medium of dealers who certify their own compliance. The dealer is not entitled to even a temporary injunction to restrain Federal Agencies from accepting the second lowest bid for automobiles in the case where the lowest bid involved automobiles manufactured by one who fails to certify compliance with the Code. The Executive Order is reasonable and valid and complainant could not show that it was even entitled to submit a bid, the required certificate being a condition precedent. It is unreasonable that the President be compelled to contract with any company which is thwarting the Recovery Program."

The following day, May 25, 1934, Orders dismissing the bills of complaint, granting the motion to dismiss, denying the prelininary injunction and dissolving the temporary restraining Order were filed.

2. ANDREWS PAPER COMPANY CASE.

Under date of August 30, 1934, Comptroller General McCarl wrote the Secretary of Treasury as follows:

> "There has been received in response to my request of August 10, 1934, your report of August 15,1934, to the effect that pursuant to the terms of Executive Order 6646, dated March 14, 1934, it had been determined by the Administrator for Industrial Recovery that a bid submitted by the R. P. Andrews Paper Company,

and opened July 27, 1934, for the delivery to the Bureau of Engraving and Printing of 700,000 pounds of wiping paper at $.0408 per pound, less discount of 2 percentum for payment within 30 days, was not in accord with the applicable approved Code of Fair Competition, for the reason that said company had filed a price of $.0408 net with the applicable Code Authority; that is, the price so filed did not include discount and the bid was not in accordance with Code requirements, but see Executive Order dated June 29, 1934, amending the Executive Order of May 14,1934.

"In view of the facts reported, and the terms of the named Executive Orders, this office is not required to object to the uses of appropriated monies for making payment to the next lowest bidder whose price did conform to the Code requirements. The protesting bidder is being advised in my letter of today accordingly."

It may be seen that the court's and Comptroller General's rulings on the Northwest Motor Company Case, supra, and the Comptroller General's ruling in the Andrews Paper Company Case, which reversed the former holdings, of the Comptroller general in 13 Comp. Gen. 100; 127 and 181, that posted prices and marketing agreements did not apply to sales to the United States, greatly strengthened the whole NRA structure in the matter of government contracts, and also gave Executive Order 6646 a favorable status in a higher court of law.

3. COMPTROLLER GENERAL (A-57744)

Under date of October 20, 1934, the Comptroller General wrote the Secretary of War that:

"Relative to the Quartermaster General's inquiry as to whether certificates of Code compliance will be required by this office in connection with Public Utilities Contracts, it is considered that the exemption contained in Administrative Order No. X-30, issued May 15, 1934, by the Administrator for Industrial Recovery, exempting contracts of the Immigration and Naturalization Service, United States Department of Labor, for water, gas, electricity, telephone and other services furnished by public utilities as part of their regular service from the operation of the provisions of Executive Order 6646, is equally applicable to contracts of other departments, and certificates of Code compliance with respect to such contracts will not be

required by this office for audit purposes". (*)

From the very plain and explicit provisions of Administrative Order No. X-30 (**) there does not appear any justifiable basis for the Comptroller General's holding that an exemption specifically granted to one branch of a Government department should likewise apply to all departments and agencies of the Federal Government. It can be readily seen that this holding of the Comptroller General completely destroyed the purpose of the Executive Order in the whole public utilities field.

4. NORTHWESTERN NEWSPAPER UNION CASE.

The Secretary of Agriculture, under date of January 21, 1935, advised the Comptroller General that under date of November 22, 1934, the Government Contracts Branch of the National Recovery Administration recommended to his department that their contract with the Northwestern Newspaper Union, for providing a nation-wide newspaper matrices and press-proof service for the Agricultural Adjustment Administration, which does not expire by time limitation until June 30, 1935, be forthwith cancelled, because the contractor in bidding had violated Article VI, Section 1, of the Code for the Electrotyping and Stereotyping Industry, by quoting a price per square inch (as requested by the department) instead of a price per each as required by the standard scale. (Article VI, Approved Code No. 179.)

The Comptroller General, under date of March 27, 1935, replied in pertinent part as follows:

> "It does not appear that they provide authority for cancellation of the contract -- authority for cancellation being restricted to matters occurring in connection with performance. It is to be observed that the Executive Order confers no authority for the cancellation of a contract unless in a performance thereof, the contractor violates the applicable Approved Code of Fair Competition, and the fact that the contractor may have violated such Code in the submission of the bid is not equivalent to a violation of the approved Code by the contractor in the performance of the contract.
>
> "Accordingly, you are advised there exists no legal authority in either the contract or in the Executive Order of March 14, 1934, for the cancellation of this contract." (***)

(*) Appendix No. 1, Pages LIX-LXI (in supplement in NRA archives) Comp. Gen. (A-57744)

(**) Appendix No. 117 (in Addendum)

(***) Appendix No. 1, Pages LXX - LXXIII (in Supplement in NRA Archives) Comp. Gen. (A59388)

The above ruling of the Comptroller General appears very arbitrary, in view of the plain and explicit provisions of Section 2 of the Executive Order which provides:

> "Any person falsely certifying as to compliance as aforesaid, who submits any such proposal, bid, contract, or subcontract, or accepts any purchase order may be punished as provided in Section 10 (a) of the National Industrial Recovery Act ..... and in event of any such false certification by any such person, any contract, subdivision, or purchase order to which he is partly secured by or in furtherance of, any such proposal or bid may be cancelled by the other party thereto, and the unfinished portion thereof completed at the expense of the person guilty of such false certification, and his sureties, if any."

CHAPTER VI

ADMINISTRATIVE ORDER X-48

Early in 1934 it became increasingly apparent that various fair trade practices of approved codes as well as rules and regulations issued pursuant thereto by code authorities were in conflict with long established procedure of federal, state and municipal purchasing agencies, and in some cases with statutory and city charter limitations. This conflict led to the submission of bids to governmental buyers, in such ways, form and terms as prevented their being even considered, or containing such provisions as could not be subscribed to in contractual form by these procurement officers.

Complaints were received from many sources aimed at the form in which bids were being invited by procurement officers, and on the other hand complaints were received from procurement officers attacking the form and conditions of bids being submitted due to code provisions or supplementary regulations. When the Procurement Division of the Treasury Department began its semi-annual task of preparing invitations for bids, and inviting, receiving,and analyzing them incident to the making of awards of contracts to cover the anticipated but indeterminate requirements of the executive departments and independent agencies for the first half of the fiscal year beginning July 1, 1934, several conflicts came to light which were brought to the attention of the NRA. After a flood of these were received, Office Memorandum 201 of May 5, 1934 was issued, directing that a study be made of the conflicts, and a report thereon be made to the "Special Assistant Administrator."

Realizing the necessity of an immediate remedy for this situation, a study and analysis was made to determine which of the conflicts were the most far reaching in their effect. This was largely determined by the complaints which had already been received from federal, state and municipal purchasing agencies as well as from members of industry who had submitted bids to these agencies and had failed to have them considered. After this analysis was made, and conferences were held with members of the various NRA advisory boards and industry divisions, a proposed order was drafted by the government contracts branch and submitted to the Administrator(*) which would grant certain exemptions to members of industry if they so desired, and if their respective codes should otherwise prohibit, to submit bids to meet certain conditions and provisions desired by the procurement agencies. This proposed order was subsequently approved and promulgated as Administrative Order No.X-48 of June 12, 1934(**)

It was not thought that this order would be the ultimate cure for the situation it sought to remedy; it was, however, regarded as a temporary solution in recognition of the exigencies of the momentary situation facing purchasing agencies.

Although many members of industry voiced loud disapproval of some of its provisions the order remained in effect until the suspension of codes by the Supreme Court decision of May 27, 1935.

(*) Memorandum dated June 9, 1934 fromFrank Healy to General Johnson (NRA Files, Government Contracts Division, Folder C-2,20)

(**) Appendix No. 116 (in Addendum)

CHAPTER VI

EXECUTIVE ORDER 6767

Executive Order 6767 was promulgated June 29, 1934 as a result of the charges made by purchasing representatives of State and municipal governments, federal agencies and certain quasi-public institutions at price hearings held by the National Recovery Administration during January and February, 1934. These charges were in general against price uniformity and excessive price advances which they alleged indicated agreement among bidders.

Executive Order 6767 permitted bidders to Governmental agencies to quote them prices not more than 15 percent below their file prices under open price provisions in codes. It was predicted by industry in general that such a price differential to governmental agencies would result in destructive price cutting and price wars. Therefore, the Executive Order under Section 2, provided:

> "If upon complaint made to the Administrator for Industrial Recovery, he shall find, after due investigation, that the tolerance of 15 percent provided in this Order is resulting in destructive price cutting in a particular trade or industry, he is hereby authorized to issue an administrative order reducing said tolerance of 15 percent for such trade or industry to the extent he shall find necessary to prevent such destructive price cutting, but in no event to a tolerance of less than 5 percent."

Section 3 of the Order directed the Administrator for Industrial Recovery to cause a study to be made of the effect of the Order upon the maintenance of standards of fair competition in sales to public and private customers and to report to the President thereon.

This study was conducted and on April 8, 1935, the following report was submitted to the President by the National Industrial Recovery Board:

> "This report is submitted pursuant to paragraph 3 of Executive Order No. 6767, dated June 29, 1935, permitting the quotation of prices to governmental agencies of not more than fifteen percent below the bidder's filed prices. The Order provided that the Administrator for Industrial Recovery should make a study of the effects of the Order upon the maintenance of standards of fair competition in sales to public and private customers and report to you thereof.
>
> "You will remember that the Administrator caused price hearings to be held on January 9 and 10, 1934, followed by public hearings from February 27 to March 2, 1934. At these hearings charges of price uniformity and excessive price advances were made by certain purchasing representatives of city, state and federal

governments and certain quasi-public institutions. It was alleged that there had been a substantial increase in the number of uniform bids, called 'tie Bids', which were alleged to indicate agreement among the bidders. In addition, the peculiar circumstances of governmental purchasing agents, due to legal requirements as to the lowest responsible bidder, as compared with the ordinary purchaser, were emphasized. Many of the charges attributed the difficulties to the open price filing provisions of codes.

"In an effort to meet the situation, Administrative Order No. X-48 and Executive Order No. 6767 were issued. Administrative Order X-48 gave persons submitting bids to governmental agencies certain exemptions from compliance with code provisions governing the making of quotations, and put governmental agencies in the most favorable buyer classification. Executive Order No. 6767, pursuant to which the National Industrial Recovery Board now makes this report, allowed bidders to governmental agencies to quote prices not more than fifteen percent below their prices filed under open price provisions in codes.

"Subsequent to the issuance of the Order and pursuant to the Order, the National Recovery Administration had the Research and Planning Division make a study of the effects of the Order.

"Method of Preparation of the Study. The Research and Planning Division sought the answer to a number of questions, including the effect of the Executive Order on public purchases, on the number of tie-bids, the number of tie-low bids (uniform low bids) and on prices. It was not possible to get really complete information because of the unusual character of the data required. A certain amount of information was secured, however, through the use of questionnaires, field trips to governmental purchasing offices of the Treasury Department, Navy Department, State of Maryland, Commonwealth of Pennsylvania and city purchasing offices of Boston and Philadelphia, and other available sources.

"Limitations of the Study. The Board is of the opinion that the study cannot be used as a basis for broad conclusions as to the effect of code provisions on prices and, indeed, such was not the purpose of the study. It may be questioned whether the study reflects with any degree of finality the effects of Executive Order 6767. It is pertinent to raise the question whether or not all public purchasers have had the same experience as those in the small sample

here covered. The study states that an answer to this question was sought but not obtained. Little evidence has been compiled with respect to the number of bidders on each item, which information would indicate the extent of competition in a particular industry.

"Furthermore, prices bid were not available in sufficient quantity for satisfactory analysis as the study states, tie-bids with increased prices and tie-bids with decreased prices do not mean the same thing. Under the Order, price changes effective as to governmental purchases might be made either by granting the governmental purchaser a discount below the filed prices or by changing the prices already on file. Consideration of the price level is clearly pertinent to any question of the maintenance of standards of fair competition and to the effects of the Order upon the maintenance of such standards.

"Furthermore, the study does not indicate whether the bidders involved in the bid openings for which data were available were manufacturers or distributors, although an effort was made to secure this information. Obviously, uniform bidding by distributors cannot be attributed, without further analysis, to the pricing practices of manufacturers. Therefore, compilations in the study made on the basis of industry products may be misleading unless this fact is taken into consideration.

"It should be noted that only those industries in which tie-bids were most common at the Treasury and Navy Departments were selected for study. Since the cases selected were those in which tie-bids were most common, this study cannot properly be used as an indication of the extent to which tie-bids exist or do not exist generally in industry, although it can be used as some indication of the trend of the number of tie-bids.

"Tie-Bids. The sixty nine industries selected were divided into five classes based upon the extent of their uniformity in bids, although the small number of items reported on as to some industries makes the information inconclusive in such instances.

Class I contains 9 industries which show a very high uniformity in bids since Executive Order No. 6767.

Class II contains 10 industries showing a moderately high uniformity or increasing uniformity.

Class III contains 18 industries which show an intermediate uniformity in bidding, with Executive Order No. 6767 having no effect.

Class IV contains 18 industries in which Executive Order No. 6767 possibly was effective in bringing about bid diversity.

Class V contains 14 industries in which tie-bids were infrequent.

"While it is tie-low bids that create a problem for governmental purchasing agencies, it is nevertheless true that such bids may indicate the closest kind of competition for governmental business, a competition which may only be resolved from the viewpoint of the purchasing agent by consideration of standards of quality and service. The study indicates definitely that tie-bids were widely prevalent prior to the codes. Moreover, in numerous industries the percentage of tie-low bids prior to the codes was strikingly high. The codes did not create the purchasing agent's problem. Seemingly, the problem was intensified during the code period, although this was not the case with respect to the products of many industries; and, at least to some degree the intensification may well have been due to the general stabilization of prices at the end of a long period of acute price changes subsequent to 1929. It is pertinent to note as to Class IV industries, which showed a strong trend toward tie-low bids during the code period, that subsequent to Order 6767 this trend was sharply reversed. This situation raises doubt that there was collusion in the Class IV industries.

"The outstanding impression which is gathered from the analysis of the material examined is that there was no uniformity in trend of tie-bids subsequent to the issuance of Executive Order No. 6767. This lack of uniformity of trend exists as between different governmental agencies purchasing from the same industry. For instance, the low bids on paper were tied on 100 per cent of the cases selected from the Treasury and not at all at Philadelphia. There are numerous other examples of extreme differences between the percentages of tie-bids in a particular industry when submitted to different governmental agencies.

"Executive Order No. 6767 appears to have had

no great effect upon the tie-bids in one direction or another. It appears that the discount permitted by the Order has actually been used in relatively few of the industries covered in the study and that there is only an inference that it has affected tie-bidding in certain cases. While in some industries there is a decrease in the number of tie-bids after the issuance of the Order, yet in others there has been an increase. Out of a total of 85 sets of contracts studied, all relating to purchases of the Procurement Division of the Treasury, and the Bureau of Supplies and Accounts of the Navy, there is little trend either toward increase or decrease. Some 41 showed an increase in the amount of tie-bids after the Order was issued, 10 showed little or no change, while 34 showed a decline. On the other hand, considering the period covered by codes, a count by industries studied shows that the percentages of tie-low bids has decreased subsequent to the issuance of the Order in 31 industries, is the same in 15 and has increased in only 21.

"The experience under any particular code and under the Executive Order indicates that factors other than the Order or the code provisions were operative--factors which vary from industry to industry in accordance with the individual price and production technologies and the other ways of doing business common in the industry or trade. On the whole they are factors that have been in operation for a long time and center around the possibility of free and open competitive markets. Where the firms are few in number, where the product is manufactured according to precise specifications, where the industry is well organized and where information is widely disseminated, tie-bids are more likely to occur. On the other hand, where purchasing agents are alert and aggressive and where the government purchases amount to a substantial proportion of the total output of the industry, the number of tie-bids will tend to be somewhat small.

"Prices to Public Purchasers. As has been pointed out, the evidence as to prices bid is extremely fragmentary and insufficient for any generalization. The conclusion that Executive Order No. 6767 has had any effect on prices can neither be sustained nor disapproved on the basis of the material examined. In the opinion of the majority of the 102 purchasing agents who replied to the questionnaires, the Order has not had any substantial effect on prices.

"Maintenance of Standards of Fair Competition to Private Purchasers and Others. The Order appears not to have involved any special benefits or losses to private purchasers, nor indeed was it designed to do so.

"From the point of view of industry, it should also be noted that there is little evidence that the Order has had much effect in promoting destructive price cutting, suspension of open price provisions, or sales below cost.

Apparently, it has not affected the general market.

"Future Treatment. If it is a sound conclusion that tie-bids are not greatly affected by code provisions or by Executive Order No. 6767 but are mainly due to other factors which have existed for some time, it seems that NRA action on individual situations, based on its policies, is the best method of treatment.

"The National Recovery Administration has sought and is seeking to promote such self-government by industry of business practices in the market places as would make possible socially beneficial price flexibility. NRA policy, as expressed in Office Memorandum No. 228 of June 7, 1934, is not only to avoid price fixing but also to prevent destructive price cutting. The objective is to achieve fair competition based on knowledge of competitive factors to the fullest extent possible without unduly curtailing private initiative or destroying incentives to any individual legitimately to extend his business.

"The early days of the National Recovery Administration resulted in many experiments in the new legislative field of price provisions. Out of the experience of that period principles have been formulated and will continue to be formulated which indicate the extent to which industry should be permitted to go in regard to price provisions... Should the Congress renew the National Industrial Recovery Act for a further period of time such principles so far as consistent with the new legislation will be put into effect in all codes. If price provisions in codes have had any part in permitting the making of tie-bids, the Board believes that incorporation of such principles in codes, as they are revised under new legislation, will effectively meet the situation to the extent that code provisions may affect it."

CHAPTER VII

EVALUATIONS AND CONCLUSIONS

A. EXECUTIVE ORDER 6246

As a secondary means of enforcing Codes of Fair Competition and the standards established by the President's Reemployment Agreement, Executive Order 6246 was bound to be too narrow in scope (its application was only to supplies) and too deficient in its requirements as to compliance.

Its own inherent weaknesses, together with the various rulings of the Comptroller General, that posted prices and marketing and licensing agreements in codes did not apply to sales to the United States, so emasculated any effectiveness that the Order might have had that its revocation or revision was inevitable.

Just what the Order accomplished besides providing a background of experience for drafting Executive Order 6646 is a matter of individual opinion. There are no cases known to the writer where any low bids otherwise acceptable by law were rejected because of the provisions of the Order, or where any contracts were cancelled due to failure on the part of the contractor to comply with its requirements.

B. EXECUTIVE ORDER 6646

Executive Order 6646 not only greatly increased the scope of its predecessor, both as to dollar coverage and compliance requirements, but it also provided a means of obtaining at least certified, or affirmatively stated, compliance, not only of Government contractors, but also of bidders, on contracts involving Federal funds. Under its terms there was provided a practical, and at least theoretically quick, means of determining non-compliance on the part of Government contractors and bidders. Its requirements, however, as provided in Section 1(d), went so far as to expose the whole Order to objection, and not unjustly so. The Order, however, got off to a good start because of the favorable decisions of the Comptroller General and the District Supreme Court in the Northwest Motor Company cases shortly following its promulgation.

Without attempting to establish its degree of success in figures or percentages, it is reasonable to assume on the basis of facts contained in this study that Executive Order 6646 was one of the most, if not the most, effective means of enforcing Title I of the NIRA. Had the recommendations of the NRA as to contract cancellations for non-compliance been mandatory rather than permissive, and had there been more coordination of the compliance requirements of the various Government agencies, there is little doubt that the Order would have been far more effective than it was.

C. EXECUTIVE ORDER 6767

Judging by the National Industrial Recovery Board's report to the President as contained in Chapter VI, of this study, Executive Order 6767 appears to have had no appreciable effect in reducing or eliminating the number of tie-bids submitted to governmental agencies, nor does it appear to have had effect in lowering the allegedly excessive prices submitted in these bids. This conclusion is further sustained by the following excerpt of the minutes of the National Industrial Recovery Board of April 4, 1935:

> "Item 7 ..... It was agreed that after making a report to the President, the Board should take up for consideration the question of revocation or revision of Executive Order 6767."

ADDENDUM

For the convenience of the reader the essential parts of the War Department Instructions Circulars (Appendices 60 to 80 inclusive and 82, 83, 84, 86 and 88 of the Supplement in the N.R.A. archives) and certain pertinent Executive and Administrative Orders are here reproduced.

APPENDIX NO. 60

August 19, 1933.

Purchases under the National Recovery Act. - The following instructions are issued for carrying out the provisions of the Executive order dated August 10, 1933, on the subject of "Administration of the National Recovery Act."

1. Application of the order. - The Executive order applies to all purchases of supplies mentioned in d below within the continental limits of the United States, the Territories of Hawaii and Alaska, the Panama Canal Zone, Puerto Rico, and the Virgin Islands. The Philippine Islands are excluded from the provisions of the order.

a. The order is not retroactive.

b. All contracts for supplies, formal or informal, for any amount are affected by this order.

c. The order does not apply to construction contracts.

d. The order applies to supplies mined, produced, or manufactured in the United States as contemplated by Section 2, Title III, of the act of Congress approved March 3, 1933, entitled "An Act making appropriations for the Treasury and Post Office Departments for the fiscal year ending June 30, 1934, and for other purposes" (47 Stat. 1520; Bul. No. 5, W.D., 1933) except that where supplies are purchased that are not mined, produced, or manufactured in the United States the special or general code of fair practice shall apply to that portion of the contract executed within the United States.

e. All bidders must be informed that on all proposals (formal or informal) in event of award, the contract (formal or informal) will provide that:

The contractor agrees that if he fails to comply with all provisions of the applicable code of fair competition for the trade or industry or subdivision thereof concerned approved under authority of the National Industrial Recovery Act, approved June 16, 1933 (Public No. 67, 73d Congress), or if there be no approved code of fair competition for the trade or industry or subdivision thereof concerned, then with the provisions of the President's Reemployment Agreement promulgated under authority of Section 4 (a) of that act, or any amendment thereof, without regard to whether the contractor is himself a party to such code or agreement, the Government may by written notice to the contractor terminate the contractor's right to proceed with the contract, and purchase in the open market the undelivered portion of the supplies covered by the contract, and the contractor and his sureties shall be liable to the Government for any excess cost occasioned the Government thereby.

The contractor further agrees that where the supplies bid upon are not mined, produced, or manufactured in the United States the special or general code of fair practice shall apply to that portion of the contract executed in the United States.

2. Changes in Standard Forms.- The following changes will be made in Standard Forms 31, 32, 33, 41, and purchase orders in order to comply with the provisions of the Executive order.

a. Add to Standard Form 31, Standard Government Form of Bid (Supply Contract), Standard Form 33, Standard Government Short Form Contract (Supplies), and include in all requests for informal quotations:

(1) The bidder agrees that he will comply with all provisions of the applicable approved code of fair competition for the trade or industry or subdivision thereof concerned, or if there be no approved code of fair competition for the trade or industry or subdivision thereof concerned, then with the provisions of the President's Reemployment Agreement promulgated under authority of Section 4 (a) of the Act of Congress entitled "An Act to encourage national industrial recovery, to foster fair competition and to provide for the construction of certain useful public works, and for other purposes, "approved June 16, 1933 (Public No. 67, 73d Congress), or any amendment thereof, without regard to whether the contractor is himself a party to such code or agreement.

(2) The bidder further agrees that where the supplies bid upon are not mined, produced, or manufactured in the United States the special or general code of fair practice shall apply to that portion of the contract executed within the United States.

b. Add to Standard Form 32 (Form of Contract - Supplies), Standard Form 33 (Short Form Contract), Standard Form 41 (Form of contract - coal), and all purchase orders the following provisions:

(1) The contractor agrees that if he fails to comply with all provisions of the applicable code of fair competition for the trade or industry or subdivision thereof concerned approved under authority of the National Industrial Recovery Act, approved June 16, 1933 (Public No. 67, 73d Congress), or if there be no approved code of fair competition for the trade or industry or subdivision thereof concerned, then with the provisions of the President's Reemployment Agreement promulgated under authority of Section 4 (a) of that act, or any amendment thereof, without regard to whether the contractor is himself a party to such code or agreement, the Government may by written notice to the contractor terminate the contractor's right to proceed with the contract, and purchase in the open market the undelivered portion of the supplies covered by the contract, and the contractor and his sureties shall be liable to the Government for any excess cost occasioned the Government thereby.

(2) The contractor further agrees that where the supplies bid upon are not mined, produced, or manufactured in the United States the special or general code of fair practice shall apply to that portion of the contract executed within the United States.

5. In all cases in which invitations for bids have been issued prior to the receipt of these instructions and on which bids have been opened but awards not made, the low bidder will be requested to sign a contract incorporating the provisions of paragraph 2 b. If the low bidder refuses to sign such contract all bids will be rejected and the supplies readvertised for under conditions stated in paragraph 2 a.

(A.G. 400.13 (8-16-33).)

APPENDIX 61

October 5, 1933.

Purchases under the National Recovery Act.....Section I
Changes in AR 35-6520, 35-6560, and 35-6680..... . " II

I--Purchases under the National Recovery Act.

Paragraph 2, Circular No. 44, War Department, 1933, is amended by adding subparagraph c thereto as follows:

c. When supplies are purchased in the open market or under ... contracts providing for deliveries from time to time on call, a certificate as follows must be made by the vendor and filed with the voucher covering such purchase. The certificate may be furnished as a separate document or may be placed on the invoice or voucher.

(1) It is hereby certified that in the execution of this order or contract I (or we) have complied with all provisions of the applicable code of fair competition for the trade or industry or subdivision thereof concerned approved under authority of the National Industrial Recovery Act, approved June 16, 1933 (Public No.67, 73rd Congress), or if there be no approved code of fair competition for the trade or industry or subdivision thereof concerned, then with the provisions of the President's Reemployment Agreement promulgated under authority of Section 4(a) of that Act or any amendment thereof.

(2) I (or we) further certify that where the supplies furnished were not mined, produced, or manufactured in the United States the special or general code of fair practice has been complied with on that portion of the order of contract executed by me (or us) within the United States.

(A.G.400.13 (9-25-33).)

APPENDIX 62

October 12, 1933.

III--Purchases under marketing agreements, approved by the Secretary of Agriculture, under the Agricultural Adjustment Act approved May 12, 1933, as amended.--The following instructions are issued for carrying out the provisions of the marketing agreements approved by the Secretary of Agriculture under the authority of the Agricultural Adjustment Act approved May 12, 1933:

1. Application of the agreements.--a. The marketing agreements apply to all contracts, formal or informal, for supplies in any amount of the class or classes covered by such approved agreements.

b. All bidders must be informed that on all proposals (formal or informal) in event of award, the contract (formal or informal) will provide that --

"The contractor shall comply with all the provisions of the marketing agreements approved by the Secretary of Agriculture under the Agricultural Adjustment Act and in effect on the date of award, without regard to whether the contractor is himself a party to any of the said approved marketing agreements. If the contractor fails to comply with any of the approved marketing agreements covering the articles herein awarded to him, the Government may by written notice to the contractor terminate the contractor's right to proceed with the contract and purchase in the open market, or otherwise, the undelivered portion of the article or articles contracted for herein for which he has failed to comply with all the conditions of an approved marketing agreement, applying to the said article or articles and the contractor and his sureties shall be liable to the Government for any excess cost occasioned the Government thereby, Provided: That the determination of the Secretary of War of any failure of the contractor to comply with the terms of the approved marketing agreements, shall be final and conclusive on the contractor.

The foregoing stipulation covers the following items which have been bid upon and awarded under this contract:

_____

_____".

2. Changes in Standard Forms.-- The following changes will be made in Standard Forms Nos. 31, 32, and 33, and purchase orders, whenever supplies of the class covered by marketing agreements are purchased:

a. Add to Standard Form No. 31 (Standard Government Form of Bid (Supply Contract)), and Standard Form No. 33 (Standard Government Short Form Contract (Supplies)), for all subsistence stores, and include in all requests for information quotations on all subsistence stores the following:

"The bidder agrees that he will comply with all the provisions of the marketing agreements approved by the Secretary of Agriculture under the Agricultural Adjustment Act and in effect on the

APPENDIX NO. 63

October 19, 1933.

IV--Purchase of supplies from Public Works funds. --In the purchase of supplies from funds allotted to the War Department by the Federal Emergency Administration of Public Works the regular Government Standard Forms will be used, with the addition of the following special contract provisions:

1. a. Domestic materials.--In the performance of this contract the contractor, subcontractors, material men, or suppliers shall use only such unmanufactured articles, materials, and supplies as have been mined or produced in the United States, and only such manufactured articles, materials, and supplies as have been manufactured in the United States substantially all from articles, materials, or supplies mined, produced, or manufactured, as the case may be, in the United States, except as provided in the specifications.

b. NRA materials.--Only articles, materials, and supplies produced under codes of fair competition approved under Title I of the National Industrial Recovery Act, or under the President's Reemployment Agreement, shall be used in the performance of this contract, except when the contracting officer certifies that this requirement is not in the public interest or that the consequent cost is unreasonable.

c. Local preference.--So far as practicable, and subject to the provisions of a and b above, preference shall also be given to the use of locally produced materials if such use does not involve higher cost, inferior quality, or insufficient quantities, subject to the determination of the contracting officer.

d. Convict labor.--No materials manufactured or produced by convict labor shall be used or furnished in the performance of this contract.

e. Inspection of records.--The Federal Emergency Administrator of Public Works and the contracting officer, through their respective authorized agents, shall have access to all pay rolls, records of personnel, invoices of materials, and any and all other data relevant to the performance of this contract.

f. Reports.--The contractor may be required to report in triplicate monthly through the contracting officer, and cause all subcontractors to report in like manner, within 5 days after the close of each calendar month on forms to be furnished by the United States Department of Labor, the number of persons on their respective pay rolls, the aggregate amount of such pay rolls, and the man-hours work, wage scales paid to the various classes of labor, and the total expenditures for materials, in the performance of this contract. He may also be required to furnish to the contracting officer the names and addresses of all subcontractors at the earliest date practicable.

date of award applicable to the class or classes of supplies bid upon without regard to whether the contractor is himself a party to any of the said approved marketing agreements."

b. Add to Standard Form No. 32 (Form of Contract - Supplies), Standard Form No. 33 (Standard Government Short Form Contract (Supplies)),and to all purchase orders the following provision:

"The contractor shall comply with all the provisions of the marketing agreements approved by the Secretary of Agriculture under the Agricultural Adjustment Act and in effect on the date of award, without regard to whether the contractor is himself a party to any of the said approved marketing agreements. If the contractor fails to comply with any of the approved marketing agreements covering the articles herein awarded to him, the Government may by written notice to the contractor terminate the contractor's right to proceed with the contract and purchase in the open market, or otherwise, the undelivered portion of the article or articles contracted for herein for which he has failed to comply with all the conditions of an approved marketing agreement, applying to the said article or articles, and the contractor and his sureties shall be liable to the Government for any excess cost occasioned the Government thereby, Provided: That the determination of the Secretary of War of any failure of the contractor to comply with the terms of the approved marketing agreements, shall be final and conclusive on the contractor.

The foregoing stipulation covers the following items which have been bid upon and awarded under this contract:

_____

_____".

3. In cases where invitations for bids for supplies, which are subject to approved marketing agreements, have been issued prior to the receipt of these instructions and upon which bids have been opened but awards not made, the low bidder will be requested to sign a contract incorporating the provisions of paragraph 2b. If the low bidder refused to sign such a contract all bids will be rejected and the supplies readvertised for under conditions stated in paragraph 2a.

(A.G. 400.13 (10-9-33).)

g. Termination for breach.--In the event any of the provisions of this contract are violated by the contractor or any subcontractor, the contracting officer may terminate the contract by written notice to the contractor, and purchase similar supplies in the open market or otherwise, and the contractor and his sureties shall be liable to the Government for any excess cost occasioned the Government thereby.

h. Subcontracts.--(1) No subcontract shall be let to any subcontractor who has not signed and complied with the applicable code or codes of fair competition approved under Title I of the National Industrial Recovery Act for the trade or industry or subdivision thereof to which his work relates, or, if there be no approved code of fair competition for such trade or industry or subdivision, who has not signed and complied with the President's Reemployment Agreement.

(2) The contractor shall cause appropriate provisions to be inserted in all subcontracts relating to this contract to insure the fulfillment of all its provisions affecting such subcontracts or subcontractors.

2. The provisions of Section 53, P.W.A. Bulletin No. 51, will be strictly complied with.

(A.G. 400.13 (10-16-33).)

V.--Purchases under the National Recovery Act.--The following instructions supplementary to those issued in Circular No. 44 and Section I, Circular No. 51, War Department, 1933, and Section IV of this circular, are published for the information and guidance of all concerned:

1. Hereafter, when bids or informal quotations are asked for supplies or materials, all prospective bidders will be informed that, before payment is made for any of the supplies or materials furnished under the contract or agreement, the vendor must furnish, if called upon, an affidavit that, in the performance of the contract or agreement, both the vendor and each of his subcontractors, if any, have complied strictly with all of the provisions of the applicable approved code of fair competition for the trade or industry or subdivision thereof concerned or, if there be no approved code of fair competition for the trade or industry or subdivision thereof concerned, then with the provisions of the President's Reemployment Agreement promulgated under authority of Section 4(a) of the National Industrial Recovery Act, and that the supplies or materials furnished under such contract have been produced in strict compliance with such code or agreement, as the case may be. Provided, that where supplies are purchased that are not mined, produced, or manufactured in the United States, the special or general code of fair practice shall be applied to that portion of the contract executed within the United States.

2. When the amount of the contemplated purchase exceeds $50 the following provision will be inserted in the contract or in the purchase order:

As a prerequisite to payment under this contract, the vendor must furnish an affidavit that, in the performance of the contract or agreement, both the vendor and his subcontractors, if any, have strictly complied with all of the provisions of the applicable approved code of fair competition for the trade or industry or subdivision thereof concerned or, if there be no approved code of fair competition for the trade or industry or subdivision thereof concerned, then with the President's Reemployment Agreement promulgated under authority of Section 4(a) of the National Industrial Recovery Act, and that the supplies furnished under such contract have been produced in strict compliance with such code or agreement, as the case may be. Provided, that, where supplies are purchased that are not mined, produced, or manufactured in the United States, the special or general code of fair practice shall apply to that portion of the contract executed within the United States.

3. For every purchase of supplies the amount of which is in excess of $50, the vendor will be required to furnish the following affidavit which will accompany every voucher covering payment for supplies; and no voucher for supplies purchased under a contract or agreement the total amount of which is in excess of $50 will be paid by any disbursing officer until such affidavit is furnished:

AFFIDAVIT

(The State of _____ _____.)

(County of _____ _____.)

In the performance of Contract No. _____, dated _____, (Purchase Order No. _____, dated _____), (Delivery Order No. _____, dated _____), for furnishing _____, I (we) and each of my (our) subcontractors, if any, have complied strictly with all the provisions of the applicable approved code of fair competition for the trade or industry or subdivision thereof concerned or, if there be no approved code of fair competition for the trade or industry or subdivision thereof concerned, then with the provisions of the President's Reemployment Agreement promulgated under authority of Section 4(a) of the National Industrial Recovery Act, and all supplies furnished under such contract have been produced in strict compliance with such code or agreement, as the case may be.

_____

Subscribed and sworn to before me this _____day of_____ 193_____.

_____
Notary Public.

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4. If the total amount of the contract or agreement is not in excess of $50, the purchasing officer is authorized in his discretion to waive the requirement that the affidavit be executed but both the vendor and his subcontractors will neveretheless be required to comply with the provisions of Circular No. 44, or Section I, Circular No. 51, War Department, 1933, or Section IV of this Circular, as the case may be. In cases where the vendor is required to execute the affidavit, the certificate required under the provisions of Section I, Circular No. 51, War Department, 1933, need not be furnished.

5. The foregoing instructions apply to all supplies and materials purchased by the War Department, whether purchased from War Department appropriations or from the funds allotted to the War Department by the Federal Emergency Administration of Public Works, or from any other source.

(A.G. 400.13 (10-18-33).)

APPENDIX NO. 64

January 8, 1934.

I--Purchases under the National Recovery Act.--

1. The following is quoted from Executive Order No. 6354, dated October 23, 1933:

"The provisions of the President's reemployment agreement, issued July 27, 1933, shall not be held to apply to employers engaged only locally in retail trade or in local service industries (and not in a business in or affecting interstate commerce) who do not employ more than five persons and who are located in towns of less than 2,500 population (according to the 1930 Federal census) which are not in the immediate trade area of a city of larger population, except so far as such employers who have signed the President's reemployment agreement desire to continue to comply with the terms of said agreement after the date of this order; and this release of such employers who have heretofore signed the President's reemployment agreement shall be further extended so as to release to the same extent all such employers of obligations not voluntarily assumed under the provisions of a code of fair competition approved by the President. This exemption is intended to relieve small business enterprises in small towns from fixed obligations which might impose exceptional hardship; but it is expected that all such enterprises will conform to the fullest extent possible with the requirements which would be otherwise obligatory upon them."

2. Whenever bids or quotations are invited or whenever open market purchases are made, all bidders and/or vendors will be informed that when exemption is claimed under the above quoted provisions of the Executive Order of October 23, 1933, they will submit with their bid or quotation a certificate containing the following:

I (we) am (are) engaged only locally in retail trade (or in local service industries) and not in a business in or affecting interstate commerce. I (we) do not employ more than five persons and am (are) located in a town of less than 2,500 population (according to 1930 Federal census), to wit:

_____

(Name of town or village and State)

which is not in the immediate trade area of a city of larger population.

3. In case of award to an individual or firm claiming exemption as above provided this certificate will be accepted by purchasing and disbursing officers in lieu of the certificate required by Section I, Circular No. 51, War Department, 1933, and in lieu of affidavit required by Section V, Circular No. 53, War Department, 1933.

4. Purchase orders or contracts placed with individuals or firms so exempted from compliance with approved codes or the President's Reemployment Agreement will not contain any provisions relative to compliance with such codes or with the President's Reemployment Agreement.

5. The provisions of Circular No. 44; Section I, Circular No. 51; and Section V, Circular No. 5', War Department, 1933, do not apply when purchases are made of items listed in the General Schedules of Supplies, Fiscal Year 1934, and the contract for such items purchased was made by the Gen ral Supply Committee prior to August 10, 1933.

(A.G. 400.13 (1-2-34).)

APPENDIX NO. 65

February 8, 1934

I--Purchases under the National Recovery Act.--Paragraph 3, Section V, Circular No. 53, War Department, 1933, is amended by adding the following provisions thereto:

Any dealer or manufacturer who so desires may file the following blanket affidavit with the Secretary of War, which affidavit will cover all articles, materials, supplies sold by that manufacturer or dealer to any purchasing or contracting officer of the War Department:

AFFIDAVIT

State of _____)
County of _____) ss:

I, _____, having been duly sworn on oath depose and say that I am _____ of the _____, a corporation organized and existing under the laws of the State of _____, and having its principal office and place of business at _____, and as such am authorized to make this affidavit for it and its subsidiaries and associated companies, a list of which is attached hereto and made a part hereof; that the _____ and all of said subsidiaries and associated companies, and, upon information and belief, their subcontractors have complied, and are complying, strictly with all provisions of the applicable code of fair competition for the trade or industry or subdivision thereof concerned or, if there be no approved code of fair competition for the trade or industry or subdivision thereof concerned, then with the provisions of the President's Reemployment Agreement promulgated under authority of Section 4(a) of the National Industrial Recovery Act; that this affidavit is intended to and does apply to all contracts, purchase orders and delivery orders heretofore or hereafter entered into or made or to be made with the War Department or any of its branches or offices by the _____, its subsidiaries and associated companies as aforesaid; That all supplies furnished under any such contract, purchase order or delivery order have been and will be produced in strict compliance with the applicable approved code of fair competition for the trade or industry or subdivision thereof concerned, or if there be no such approved code, with the President's Reemployment Agreement; and that each invoice hereafter submitted to any disbursing officer of the War Department for payment on account of any contract, purchase order or delivery order heretofore or hereafter made and bearing thereon the signature of any duly authorized official of the companies referred to herein shall be construed to be a reaffirmation with respect thereto of the statements made herein under oath as fully and completely and equally as binding as if a new and separate affidavit were attached to each and every one of the several invoices, containing with respect to each such invoice allegations of fact substantially the same as those set forth in this affidavit.

_____
(Name) (Title)

_____
(Company)

Subscribed and sworn to
before me this _____
day of _____, 1934.

_____
Notary Public
My commission expires

_____

The names of dealers and manufacturers who have filed such an affidavit with the War Department will be announced from time to time.

When this blanket affidavit has been furnished, a separate and individual affidavit for each voucher covering supplies furnished by such dealer or manufacturer will no longer be required as a prerequisite for payment, but in lieu thereof such dealer or manufacturer will furnish the following certificate with the invoice:

I certify that in the performance of the contract, purchase order or delivery order under which this bill is rendered, the contractor, and upon information and belief each subcontractor, if any, has complied with all the provisions of the applicable approved code of fair competition for the trade or industry or subdivision thereof concerned, or if there be no approved code of fair competition for the trade or industry or sub-division thereof, with the provisions of the President's Reemployment Agreement promulgated under the authority of Section 4(a) of the National Industrial Recovery Act.

I further certify that all supplies furnished under such contract have been produced in strict compliance with such code or agreement, as the case may be. The affidavit of compliance with the provisions and requirement of the National Industrial Recovery Act executed by _____ _____ on _____ and filed with the War Department on
(Date)
_____ is hereby incorporated herein and made a part hereof.
(date)

_____
(Signature)

_____
(Title)

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APPENDIX NO. 66

March 26, 1934

1. Instructions relating to purchases under the Nation Industrial Recovery Act published in the following War Department Circulars are hereby revoked:

Circular No. 44, August 19, 1933.
Section I, Circular No. 51, October 5, 1933.
Section III, Circular No. 52, October 12, 1933.
Section IV and Section V, Circular No. 53, October 19, 1933.
Section I, Circular No. 1, January 8, 1934.
Section I, Circular No. 4, February 8, 1934.

2. The following instructions based on Executive Order No. 6246 dated August 10, 1933, Executive Order No. 6354 dated October 23, 1934, and Executive Order No. 6646 dated March 14, 1934, will hereafter govern in the procurement of supplies and the construction of public works from any public funds appropriated for or allotted to the War Department.

3. Application: These instructions apply to:

a. All supply contracts and construction contracts, formal or informal; open market purchases and cash transactions.

b. The Continental limits of the United States; the territories of Hawaii and Alaska; the Panama Canal; Puerto Rico, and the Virgin Islands.

c. All Government agencies or instrumentalities administered by the War Department, including government-owned and government-controlled corporations.

d. Supplies mine, produced or manufactured in the United States as contemplated by Title III of the Act of Congress approved March 3, 1933, entitled "An Act making appropriations for the Treasury and Post Office Departments for the Fiscal Year ending June 30, 1934, and for other purposes" (47 Stat. 1520; Bulletin No. 3, War Department, 1933), except that where supplies are purchased that are not mined, produced or manufactured in the United States the special or general code of fair competition shall apply to that portion of the contract executed within the United States.

4. a. All invitations for bids, written or oral, and all requests for quotations issued subsequent to March 1-, 1934, on which awards have not been made prior to the receipt of these instructions shall contain the following provision:

> "No bid (or quotation) will be considered or accepted unless it includes or is accompanied by the following Certificate duly executed by the bidder:
>
> > 'It is hereby certified that the undersigned is complying with, and will continue to comply with, each approved Code of Fair Competition to which it is subject, and if engaged in any trade or industry for which there is no approved Code of Fair Competition, then, as to such trade or industry it has become a party to and is complying with, and will continue to comply with, an agreement with the President under Section 4(a) of the National Industrial Recovery Act."

b. No bid or quotation which does not comply with the foregoing requirement will be considered or accepted.

c. Bidders will also be informed in the invitation as follows:

> "Any person falsely certifying as to compliance as aforesaid who submits any such proposal, bid, contract, or sub-contract, or who accepts any purchase order, may be punished as provided in Section 10(a) of the National Industrial Recovery Act by a fine of not to exceed Five Hundred Dollars ($500.00) or imprisonment not to exceed six (6) months, or both, and in event of any such false certification by any such person, any contract, sub-contract, or purchase order to which he is party secured by or in furtherance of any such proposal or bid may be cancelled by the other party thereto, and the unfinished portion thereof completed at the expense of the person guilty of such false certification and his sureties, if any."

5. a. All bidders will be informed that in the event of award the contract, formal or informal, or the purchase order will provide as follows:

"The contractor (vendor) agrees that it will comply with each approved Code of Fair Competition to which it is subject and if engaged in any trade or industry for which there is no approved Code of Fair Competition, then, as to such trade or industry, with an agreement with the President under Section 4(a) of the National Industrial Recovery Act.

"The United States shall have the right to cancel this contract for failure to comply with this provision, and make open market purchases or have the work called for by this contract otherwise performed at the expense of the contractor.

"The contractor further agrees that where the supplies furnished are not mined, produced or manufactured in the United States the special or general Code of Fair Competition shall apply to that portion of the contract executed in the United States.

"The contractor further agrees that it will not accept or purchase for the performance of this contract or purchase order, or enter into any sub-contracts for any articles, materials or supplies in whole, or in part, produced or furnished by any person who shall not have certified that he is complying with and will continue to comply with each Code of Fair Competition which relates to such articles, materials, or supplies, or in case there is no approved Code for the whole or any portion thereof then, to that extent, with an agreement with the President under Section 4(a) of the National Industrial Recovery Act."

b. All contracts and purchase orders will contain the provisions stipulated in this paragraph.

6. In all cases in which invitations for bids were opened subsequent to March 14, 1934, and on which awards have not been made, the low bidder will be requested to furnish the certificate called for in Paragraph 4 and sign a contract incorporating the provisions of Paragraph 5. If the low bidder refuses to furnish such certificate or sign such contract, all bids will be rejected and the supplies readvertised for under the foregoing conditions.

7. If any dispute arises between a contracting and purchasing officer and any bidder, contractor, supplier or other person as to compliance with any Code of Fair Competition or with the President's

Reemployment Agreement in connection with any proposal, bid, contract, sub-contract, or purchase order, the question in dispute, together with a full report thereon, will be forwarded, through the Chief of the Supply Area, Service, or Bureau concerned, to The Assistant Secretary of War for transmittal to the Administrator for Industrial Recovery or other agency designated by him for decision. His decision, or that of the designated agency, shall be final and conclusive but the determination of the purchasing and contracting officer shall be effective for all purposes pending such decision. No contract will be cancelled because of such dispute until approval for such cancellation is given by The Assistant Secretary of War.

8. All provisions of approved Codes of Fair Competition, including minimum prices fixed by code authorities, shall apply to the making and performance of all contracts and purchases. Instructions heretofore published in letter dated January 16, 1934, AG 163 I.R. (1-17-34) Misc. M-8. Subject: Bids, that low bids would not be rejected on the ground that the prices quoted in such bids are in violation of an applicable approved Code or Marketing Agreement are revoked insofar as they apply to prices fixed by code authorities; but low bids on agricultural products, the minimum price of which is fixed by Marketing Agreements, will not be rejected on the ground that the price quoted is below the price fixed by an approved Marketing Agreement.

9. Public Works Administration Contracts.

a. Construction Contracts. Standard Forms, bulletins and instructions issued by the Public Works Administration will be used and will govern in the construction of public works from funds allotted to the War Department by the Public Works Administration. The instructions herein are applicable to proposals for Public Works Administration projects and to construction contracts for such projects only insofar as they do not duplicate or conflict with instructions or forms issued by the Public Works Administration.

b. Supply Contracts. In the purchase or supplies from Public Works Administration funds, the following special provisions in addition to those required in Paragraph 5 above will be inserted in the contract or purchase order:

(1) Convict Labor. No materials manufactured or produced by convict labor shall be used or furnished in the performance of this contract.

(2) Inspection of Records. The Federal Emergency Administrator of Public Works and the contracting officer, through their respective authorized agents, shall have access to all payrolls, records of personnel, invoices of materials and any and all other data relevant to the performance of this contract.

(3) Reports. The contractor may be required to report in triplicate monthly, through the contracting officer, and cause all sub-contractors to report in like manner, within five days after the close of each calendar month, on forms to be furnished by the United States Department of Labor, the number of persons on their respective payrolls, the aggregate amount of such payrolls, and the man-hours worked, wage scales paid to the various classes of labor, and the total expenditures for materials, in the performance of this contract. He may also be required to furnish to the contracting officer the names and addresses of all sub-contractors at the earliest date practicable.

(4) Termination for Breach. In the event any of the provisions of this contract are violated by the contractor or any sub-contractor, the contracting officer may terminate the contract by written notice to the contractor, and purchase similar supplies in the open market or otherwise, and the contractor and his sureties shall be liable to the Government for any excess cost occasioned the Government thereby.

10. Exemption from the President's Reemployment Agreement.

a. The following is quoted from Executive Order No. 6354 dated October 23, 1934:

"The provision of the President's Reemployment Agreement, issued July 27, 1933, shall not be held to apply to employers engaged only locally in retail trade or in local service industries (and not in a business in or affecting interstate commerce) who do not employ more than five persons and who are located in towns of less than 2,500 population (according to the 1930 Federal census) which are not in the immediate trade area of a city of larger population, except so far as such employers who have signed the President's reemployment agreement desire to continue to comply with the terms of said agreement after the date of this order; and this release of such employers who have heretofore signed the President's reemployment agreement shall be further extended so as to release to the same extent all such employers of obligations not voluntarily assumed under the provisions of a code of fair competition approved by the President. This exemption is intended to relieve small business enterprises in small towns from fixed obligations which might impose exceptional hardship; but it is expected that all such enterprises will conform to the fullest extent possible with the requirements which would be otherwise obligatory upon them."

b. Whenever bids or quotations are invited or whenever open market purchases are made, all bidders and/or vendors will be informed that when exemption is claimed under the above quoted provisions of the Executive Order of October 23, 1933, they will submit with their bid or quotation a certificate containing the following:

> I (we) am (are) engaged only locally in retail trade (or in local service industries) and not in a business in or affecting interstate commerce. I (we) do not employ more than five persons and am (are) located in a town of less than 2,500 population (according to 1930 Federal census), to wit:
>
> _____
> (Name of town or village and State)
>
> which is not in the immediate trade area of a city of larger population.

12. If in the opinion of any purchasing or contracting officer the public interest will be best served by making exceptions in specific cases, or otherwise, to the instructions contained in Paragraphs 4 to 8, inclusive, requests for the exceptions desired and the reasons therefor will be forwarded, through the Chief of the Supply Arm, Service or Bureau concerned, to The Assistant Secretary of War for transmittal to the Administrator for Industrial Recovery. No exceptions will be made in the instructions in Paragraphs 4 to 8, inclusive, until approval therefor has been given by the Administrator for Industrial Recovery.

APPENDIX NO. 67

April 6, 1934.

1. The following changes in letter dated March 26, 1934, A. G. 400.13 I.R. (3-21-34)Misc. M-ASW, Subject: Codes and Marketing Agreements, are published for the information and guidance of all concerned:

a. Insert the word "not" after the word "would" in the fifth line of Paragraph 8.

b. The special provisions prescribed in paragraph 9 b (2) and (3) to be inserted in contracts for supplies purchased from Public Works Funds are no longer required.

APPENDIX NO. 68

April 12, 1934.

1. Paragraph 8 of letter dated March 26, 1934, AG 400.13 I.R. (3-21-34)Misc. M-ASW, Subject: Codes and Marketing Agreements, is hereby rescinded, and the following substituted therefor:

8. a. All provisions of approved Codes of Fair Competition shall apply to the making and performance of contracts with or sales to agencies of the War Department.

b. The Comptroller General has held (MS Dec. A-51319, A-54559, April 2, 1931) that administrative responsibility in contracting on behalf of the United States is limited to seeing that the advertised specifications contain requirements similar to those prescribed in paragraph 4 above; that the bid received and accepted includes or is accompanied by a certificate substantially in the form therein prescribed and that the contract entered into with the accepted bidder of the purchase order issued to the accepted bidder contains substantially the stipulation prescribed in Paragraph 5 a above. The following is quoted from the decision:

> "The bidding is no responsibility of the contracting officer, and it is no part of his authority or responsibility to determine whether a bid as made contravenes any code. It is his duty to accept the low responsible bid containing or accompanied by the required certificate, and to see to it that the contract entered into with such low bidder contains the required provision with respect to code compliance. If, thereafter, a dispute should arise whether, "notwithstanding the certificate accompanying the bid or the stipulation contained in the contract, the bidder and/or contractor has complied and will continue to comply with the approved code of fair competition, or, if no code, then with the President's reemployment agreement, such dispute must be resolved, in the first instance, * * * by the Administrator for Industrial Recovery, or such agency as he shall designate.
>
> * * * * * * * *
>
> "If the contractor violates the code or the President's reemployment agreement, and it is so determined by the Administrator for Industrial Recovery, or such agency as he shall designate, the contract should be cancelled in accordance with the provisions of the contract inserted therein * * * and the work performed or supplies procured at the expense of the contractor as therein provided."

c. Purchasing and contracting officers will be governed by and comply with the foregoing decision.

d. The award of the contract to the lowest responsible bidder whose bid conforms to the invitation and is accompanied by the required certificate need not be delayed because of any assertion that the bid violates any code provision.

e. If, after a bid is accepted, a dispute should arise whether, notwithstanding the compliance certificate accompanying the bid or the compliance stipulations contained in the contract, the bidder and/or contractor has complied, and will continue to comply with the approved code of fair competition or with the President's reemployment agreement, the procedure will be as prescribed in Paragraph 7.

APPENDIX NO. 69

April 24, 1934.

1. Exceptions to the provisions of Executive Order No. 6646. The Administrator for Industrial Recovery has approved the following exceptions to the requirements of Executive Order No. 6646 which are set forth in paragraphs 4 and 5 of letter dated March 26, 1934 (AG 400.13 I.R. (3-21-34)Misc. M-ASW):

a. Emergency purchases of less than $50.00 and other emergency purchases, including those based on telegraphic bids, when in the opinion of the purchasing officer it is not possible or practicable to require compliance with the provisions of paragraphs 4 and 5 of the War Department letter of March 26, 1934.

b. All contracts, leases, or purchases of any nature made with or from any state government, or any political subdivision or municipality thereof.

c. All leases involving rental of land for any purposes where no services are rendered to the Government by the lessor.

d. All leases involving annual rental at a rate not exceeding $500.00 per annum.

e. Purchase orders, contracts or leases made in American possessions or territories outside the Continental limits of the United States when Territorial Codes or Territorial Modifications of basic Codes have not been approved.

APPENDIX NO. 70

May 1, 1934.

1. It has come to the attention of the War Department that instructions as to action which should be taken on alleged violations of Codes and Marketing Agreements are being received from the National Recovery Administration, from State and Local Agencies thereof, from Code Authorities or Code Committees, and Marketing Agreement Agencies.

2. The War Department desires to cooperate to the fullest extent with the National Recovery Administration and with the Agricultural Adjustment Administration, but uncoordinated instructions issued directly to War Department field agencies by agencies outside of the War Department are confusing to the War Department agencies and if executved by them may result in procurement procedure contrary to existing laws, regulations and decisions of the Comptroller General. The Administrator for Industrial Recovery has been so advised and has been requested to instruct the several divisions of his office and the local agencies of his Administration that any necessary instructions to the War Department should be addressed to the Secretary of War.

3. It is, therefore, directed that all concerned be instructed that agencies of the National Recovery Administration, Code Authorities or Marketing Agreement Agencies are not authorized to issue instructions directly to field agencies of the War Department and no action will be taken on instructions so received. If such instructions are received, they will be acknowledged and the sender notified that the matter has been referred to the Secretary of War for consideration.

4. If direct inquiries are received from outside agencies for information needed by them to assist in their investigations of reported code or marketing agreement violations, they may be furnished the names of bidders; prices bid; whether the bidders furnished the required compliance certificate; whether the contract has been awarded; if so, to whom; contract price; whether performance has been commenced or completed; and whether the contract contains the N.R.A. compliance provisions.

APPENDIX NO. 71

May 10, 1934

1. Reference is made to mimeo raph letter from this office of March 26, 1934, on the above subject.

2. The provisions of Executive Order 6646, dated March 14, 1934, are applicable to the sale of surplus and salvage property by War Department agencies, and the provisions of that Order will be complied with in connection with sale of such property.

APPENDIX NO. 72

June 21, 1934.

1. The instructions herein are a revision and compilation of all instructions now in effect which relate to N.R.A. Codes and A.A.A. Marketing Agreements as affecting War Department procurement procedure. They supersede all previous instructions relating thereto. Future changes in, or additions to, these instructions will be published from time to time in serially numbered supplements to this letter.

2. The instructions following are based upon and are in accordance with applicable Executive Orders, decisions of the Comptroller General, and letters of instruction issued by the Director of Procurement, Treasury Department. All Purchasing and Contracting Officers and agents will be governed thereby in procurement transactions involving the use of public funds.

3. N.R.A. Compliance Requirements. - Executive Order No. 6646, dated March 14, 1934.

a. Except as hereinafter provided all invitations for bids, written or oral, and all requests for quotations will contain the following provision:

"No bid (or quotation) will be considered or accepted unless it includes or is accompanied by the following Certificate duly executed by the bidder:

'It is hereby certified that the undersigned is complying with, and will continue to comply with, each approved Code of Fair Competition to which it is subject, and if engaged in any trade or industry for which there is no approved Code of Fair Competition, then, as to such trade or industry it has become a party to and is complying with, and will continue to comply with, an agreement with the President under Section 4(a) of the National Industrial Recovery Act.'"

b. Except as hereinafter provided no bid or quotation which does not comply with the foregoing requirement will be considered or accepted.

c. Bidders will also be informed in the invitation as follows:

"Any person falsely certifying as to compliance as aforesaid who submits any such proposal, bid, contract, or sub-contract, or who accepts any purchase order, may be punished as provided in Section 10(a) of the National

Industrial Recovery Act by a fine of not to exceed Five Hundred Dollars ($500.00) or imprisonment not to exceed six (6) months, or both, and in event of any such false certification by any such person, any contract, sub-contract, or purchase order to which he is party secured by or in furtherance of any such proposal or bid may be cancelled by the other party thereto, and the unfinished portion thereof completed at the expense of the person guilty of such false certification and his sureties, if any."

d. Except as hereinafter provided all bidders will be informed that in the event of award the contract, formal or informal, or the purchase order will provide as follows:

"The contractor (vendor) agrees that it will comply with each approved Code of Fair Competition to which it is subject and if engaged in any trade or industry for which there is no approved Code of Fair Competition, then, as to such trade or industry, with an agreement with the President under Section 4(a) of the National Industrial Recovery Act.

"The United States shall have the right to cancel this contract for failure to comply with this provision, and make open market purchases or have the work called for by this contract otherwise performed at the expense of the contractor.

"The Contractor further agrees that where the Supplies furnished are not mined, produced or manufactured in the United States the special or general Code of Fair Competition shall apply to that portion of the contract executed in the United States.

"The Contractor further agrees that it will not accept or purchase for the performance of this contract or purchase order, or enter into any sub-contracts for any articles, materials or supplies in whole, or in part, produced or furnished by any person who shall not have certified that he is complying with and will continue to comply with each Code of Fair Competition which relates to such articles, materials, or supplies, or in case there is no approved Code for the whole or any portion thereof then, to that extent, with an agreement with the President under Section 4(a) of the National Industrial Recovery Act."

e. Except as hereinafter provided all contracts and purchase orders will contain the provisions stipulated in "d" above.

4. <u>Exceptions to the Provisions of Paragraph 3 above.</u>

a. The Administrator for Industrial Recovery has approved the following exceptions from the operation of Executive Order No. 6646:

(1) Open market purchases (See A.R. 5-240) when the aggregate amount of a single transaction does not exceed $100, provided that the Purchasing and contracting Officer certify that it is either not practicable or it is impossible to obtain the Certificate contemplated by Section 1A of Executive Order 6646. (Par. 3a above).

(2) All contracts, leases, or purchases of any nature made with or from any State Government, or any political sub-division or municipality thereof.

(3) All leases involving rental of land for any purposes where no services are rendered to the Government by the lessor.

(4) All leases involving annual rental at a rate not exceeding $500.00 per annum.

(5) Purchase orders, contracts, or leases made in foreign countries or in American possessions or territories outside the continental limits of the United States where territorial codes or territorial modifications of basic codes have not been approved.

(6) Movements of Government freight or personnel over steamship, airplane, bus, or express lines where published tariff rates are in effect.

(7) Articles, materials, or supplies of foreign origin.

(8) When supplies must be purchased against a defaulted contract, or a new contract for the performance of work made because of a defaulted contract, the terms and conditions as regards N.R.A. code compliance will be the same in the new invitation and contract or purchase order as were required when the defaulted contract was made.

b. The Comptroller General has held that the provisions of Executive Order No. 6646 do not apply to the sale of surplus or salvage property.

c. If in the opinion of any Purchasing or Contracting Officer the public interest will be best served by making exceptions in specific cases, or otherwise, to the operation of Executive Order No. 6646, requests for the exceptions desired and the reasons therefor will be forwarded, through the Chief of the Supply Arm, Service or Bureau concerned, to The Assistant Secretary of War for transmittal to the Administrator for Industrial Recovery. No exceptions will be made except as herein provided, until approval therefor has been given by the Administrator for Industrial Recovery.

5. a. All provisions of approved Codes of Fair Competition shall apply to the making and performance of contracts with or sales to agencies of the War Department.

b. The Comptroller General has held (US Dec.A-51319, A-54559, April 2, 1934) that administrative responsibility in contracting on behalf of the United States is limited to seeing that the advertised specifications contain requirements similar to those prescribed in paragraph 3 above; that the bid received and accepted includes or is accompanied by a certificate substantially in the form therein prescribed and that the contract entered into with the accepted bidder of the purchase order issued to the accepted bidder contains substantially the stipulation prescribed in Paragraph 3 above. The following is quoted from the decision:

> "The bidding is no responsibility of the contracting officer, and it is no part of his authority or responsibility to determine whether a bid as made contravenes any code. It is his duty to accept the low responsible bid containing or accompanied by the required certificate, and to see to it that the contract entered into with such low bidder contains the required provision with respect to code compliance. If, thereafter, a dispute should arise whether , notwithstanding the certificate accompanying the bid or the stipulation contained in the contract, the bidder and/or contractor has complied and will continue to comply with the approved code of fair competition, or, if no code, then with the President's reemployment agreement, such dispute must be resolved, in the first instance, *** by the Administrator for Industrial Recovery, or such agency as he shall designate.
>
> * * * *
>
> "If the contractor violates the code or the President's reemployment agreement, and it is so determined by the Administrator for Industrial Recovery, or such agency as he shall designate, the contract should be cancelled in accordance with the provisions of the contract inserted therein *** and the work performed or supplies procured at the expense of the contractor as therein provided."

c. Purchasing and Contracting Officers will be governed by and comply with the foregoing decision.

d. The award of the contract to the lowest responsible bidder whose bid conforms to the invitation and is accompanied by the required certificate need not be delayed because of any assertion that the bid violates any code provision.

e. If, after a bid is accepted, a dispute should arise whether, notwithstanding the compliance certificate accompanying

the bid or the compliance stipulations contained in the contract, the bidder and/or contractor has complied, and will continue to comply with the approved code of fair competition or with the President's reemployment agreement, the procedure will be as prescribed in Paragraph 6.

6. a. If any dispute arises between a contracting and purchasing officer and any bidder, contractor, supplier or other person as to compliance with any Code of Fair Competition or with the President's Reemployment Agreement in connection with any proposal, bid, contract, sub-contract, or purchase order, the question in dispute, together with a full report thereon, will be forwarded, through the Chief of the Supply Arm, Service or Bureau concerned, to The Assistant Secretary of War for transmittal to the Administrator for Industrial Recovery or other agency designated by him for decision. His decision, or that of the designated agency, shall be final and conclusive but the determination of the purchasing and contracting officer shall be effective for all purposes pending such decision. No contract will be cancelled because of such dispute until approval for such cancellation is given by The Assistant Secretary of War.

b. Agencies of the National Recovery Administration, Code Authorities or Marketing Agreement Agencies are not authorized to issue instructions directly to field agencies of the War Department and no action will be taken on instructions so received. If such instructions are received, they will be acknowledged and the sender notified that the matter has been referred to the Secretary of War for consideration.

c. If direct inquiries are received from outside agencies for information needed by them to assist in their investigations of reported code or marketing agreement violations, they may be furnished the names of bidders; prices bid; whether the bidders furnished the required compliance certificate; whether the contract has been awarded; if so, to whom; contract price; whether performance has been commenced or completed; and whether the contract contains the N.R.A. compliance provisions.

7. <u>Exemption from the President's Reemployment Agreement.</u>

a. The following is quoted from Executive Order No. 6710, dated May 15, 1934:

> "Employers engaged only locally in retail trade or local service trades or industries who operate not more than three establishments and whose place or places of business is or are located in a town or towns each of less than 2,500 population and not in the immediate trade area of a city or town of larger population, as determined by the Administrator, are exempted from those provisions of the President's Reemployment Agreement and those provisions of approved codes of fair competition which relate to hours of employment, rates of pay, the minimum prices at which merchandise may be sold or

services performed, and the collection of assessments, except insofar as any such employer shall after the effective date of this order signify to the Administrator his intention to be found by such provisions. This exemption is intended to relieve small business enterprises in small towns from fixed obligations which might impose exceptional hardship; but all such enterprises are expected to conform to the fullest extent possible with the requirements which otherwise would be obligatory upon them."

b. Whenever bids or quotations are invited or whenever open market purchases are made, all bidders and/or vendors will be informed that when exemption is claimed under the above quoted provisions of the Executive Order of May 15, 1934, they will execute and submit with their bid or quotation a certificate as follows:

"The undersigned bidder hereby certifies that he is an employer engaged only locally in retail trade or local service trades or industries and that he does not operate more than three establishments and that each such place or places of business is or are located in a town or towns each of less than 2500 population and not in the immediate trade area of a city or town of larger population."

c. When bids or quotations are accompanied by the above certificate of exemption duly executed by the bidder such certificate shall be accepted in lieu of that required by Paragraph 3a, and the requirement of paragraph 3b shall not apply. In the event award of the contract is made to a bidder who furnishes such a certificate, the provisions contained in paragraph 3d shall not apply to such contract or purchase order.

8. Leases. The following provision shall be included in all leases to which Executive Order No. 6646 applies. (See Paragraph 4a(3) (4) for exceptions).

"The lessor shall comply with each approved code of fair competition to which he is subject, and if he is engaged in any trade or industry for which there is no approved code of fair competition, then as to such trade or industry with an agreement with the President under Section 4(a) of the National Industrial Recovery Act, (President's Reemployment Agreement) and the United States shall have the right to cancel this lease for failure to comply with this provision and secure premises elsewhere for the unexpired portion of this lease, in which event the lessor shall be liable to the Government for any loss or damage occasinned thereby, and the lessor shall not accept or purchase for or in connection with the performance of this lease or enter into any sub-contracts for any articles, materials, or supplies, in whole or in part produced or furnished by any person who shall not

have certified that he is complying with and will continue to comply with each code of fair competition which relates to such articles, materials, or supplies, and/or in case there is no approved code for the whole or any portion thereof then to that extent with an agreement with the President, as aforesaid."

11. Public Works Administration Contracts.

a. Construction Contracts. P.W.A. Forms, bulletins and instructions issued by the Public Works Administration will be used and will govern in the construction of public works from funds allotted to the War Department by the Public Works Administration. The instructions herein are applicable to proposals for Public Works Administration projects and to construction contracts for such projects only insofar as they do not duplicate or conflict with instructions or forms issued by the Public Works Administration.

b. Supply Contracts. In the purchase of supplies from Public Works Administration funds, the appropriate regular standard Government Forms will be used with the following additional special provision:

"Convict Labor. No materials manufactured or produced by convict labor shall be used or furnished in the performance of this contract.

APPENDIX NO. 73

June 29, 1934.

1. Public Utility Contracts. The following procedure prescribed by the National Recovery Administration will be followed by purchasing and contracting officers in cases where Public Utility Companies refuse to sign the Certificate of Compliance required by Executive Order No. 6646:

a. Investigation indicates that most of the public utility companies are in full compliance and are willing to execute the certificates; where there is only one company available and it refuses to furnish the certificate, we will, of course, take the necessary action to avoid interfering with the Government's functions.

b. Where utility companies refuse to submit bids with or without certificates, the specific instance should be referred to the National Recovery Administration for necessary action.

c. Efforts should be made to secure the certificate but if the service is in the nature of a monopoly, the National Recovery Administration will, of course, act to avoid interference with the governmental function.

2. Exemption from Provisions of Codes in connection with Quotations made to Government Agencies. The Administrator for Industrial Recovery has granted the following limited exemption from the operation of Executive Order No. 6646:

a. WHEREAS, certain provisions of Code of Fair Competition, approved under Title I of the National Industrial Recovery Act, are in conflict with statutory provisions or well established procedure relating to contracts awarded by the United States, the District of Columbia, and the various States or political subdivisions thereof (all of which are hereinafter described as governmental agencies); and

It appearing to me that the exemption hereinafter granted is in furtherance of the public interest and will tend to effectuate the policy of said Title of said Act;

Pursuant to the authority vested in me under said Title of said Act by Executive Orders of the President, including Executive Order No. 6543-A, dated December 30, 1933, and otherwise, it is hereby ordered that members of industry subject to codes of fair competition who bid or may bid on contracts to be awarded by governmental agencies be and they are hereby exempted from compliance with any provisions of such codes governing the making of quotations to governmental agencies which prohibit any of the following practices and such members, notwithstanding such prohibitions contained in such codes may:

(1) Quote prices and terms of sale to governmental agencies as favorable as those permitted to be quoted to any commercial buyer for like quantities;

(2) Quote definite prices or terms of sale, not subject to adjustment resulting in increased costs during the life of the contract, for definite quantities and for definite periods not to exceed three months (unless a longer period is now permitted by any such code);

(3) Quote definite prices or terms of sale, not subject to adjustment resulting in increased costs during the life of the contract for indefinite quantities and for definite periods not to exceed six months (unless a longer period is now permitted by any such code);

(4) Quote prices and terms to apply on contracts to become effective not more than sixty days from the date of the opening of bids;

(5) Quote prices F.O.B. point of origin and/or F.O.B. destination.

b. PROVIDED, HOWEVER, that the exemption hereby granted shall be limited to and operative only in connection with quotations made by such members to governmental agencies; that nothing in this order contained shall operate to permit deviation from or abandonment of open price and cost protection provisions now or hereafter contained in any such code; and that nothing in this order contained shall relieve any such member at any time from the duty of complying with all other provisions of such codes.

APPENDIX NO. 74

July 9, 1934.

1. In addition to the exceptions listed in paragraph 4 of letter dated June 21, 1934, A. G. 400.13 I.R. to the provisions of paragraph 3 of said letter, the Administrator for Industrial Recovery has approved the following exception from Executive Order No. 6646:

"All persons, concerns or industries, not included in or covered by the National Industrial Recovery Act, or who through Executive or Administrative Order are exempted from the operation or application of approved codes or agreement with the President; provided that in lieu of certificate required by Paragraph 1 (a) of the above Executive Order, the bidder shall certify that he or it is not included or covered, or is exempted as aforesaid."

APPENDIX NO. 75

July 13, 1934.

1. Paragraph 11b of letter dated June 21, 1934, A.G.O. 400.13 I.R., Subject - Codes and Marketing Agreements, is changed to read as follows:

a. Public Works Administration Contracts.

* * * * * * * * * * * *

b. Supply Contracts. In the purchase of supplies which involve the expenditure of P.W.A. Funds, the appropriate regular Standard Government Forms will be used and the following special provisions prescribed by the Director of Procurement, Treasury Department, will be included in such contracts or purchase orders:

"ARTICLE - Domestic materials.- In the performance of this contract the contractor, subcontractors, materialmen, or suppliers shall use only such unmanufactured articles, materials, and supplies as have been mined or produced in the United States, and only such manufactured articles, materials, and supplies as have been manufactured in the United States substantially all from articles, materials, or supplies mined, produced or manufactured, as the case may be, in the United States, except as provided in the specifications.

"ARTICLE - N.R.A. Compliance.- The contractor shall comply with each approved code of fair competition to which he is subject, and if he is engaged in any trade or industry for which there is no approved code of fair competition, then as to such trade or industry with an agreement with the President under Section 4 (a) of the National Industrial Recovery Act (President's Reemployment Agreement), and the United States shall have the right to cancel this contract for failure to comply with this provision and make open-market purchases or have the work called for by this contract otherwise performed at the expense of the contractor, and the contractor shall not accept or purchase for the performance of this contract or purchase order or enter into any subcontracts for any articles, materials, or supplies, in whole or in part produced or furnished by any person who shall not have certified that he is complying with and will continue to comply with each code of fair competition which relates to such articles, materials, or supplies, and/or in case there is no approved code for the whole or any portion thereof then to that extent with an agreement with the President as aforesaid.

"ARTICLE - Reports. - The contractor shall report, and shall cause each subcontractor to report in like manner, within five days after the close of each calendar month, on forms to be furnished by the United States Department of Labor, the number of persons on their respective pay rolls directly

connected with the project, and the number of man-hours work. Two copies of each such monthly reports are to be furnished to the contracting officer and one copy of each to the United States Department of Labor.

"ARTICLE - Convict Labor. - No materials manufactured or produced by convict labor shall be used or furnished in the performance of this contract.

"ARTICLE - Termination for breach. - In the event any of the provisions of this contract are violated by the contractor or any subcontractor, the contracting officer may terminate the contract by written notice to the contractor, and purchase similar supplies in the open market or otherwise, and the contractor and his sureties shall be liable to the Government for any excess cost occasioned the Government thereby.

"ARTICLE - Subcontractors. - The contractor shall cause appropriate provisions to be inserted in all subcontracts relating to this contract to insure the fulfillment of all its provisions affecting such subcontractors."

APPENDIX NO. 76

July 13, 1934.

The following Executive Order, approved June 29, 1934, by The President, modifying Executive Order No. 6646, is submitted for the information of all concerned:

"By virtue of an pursuant to the authority vested in me under Title I of the National Industrial Recovery Act of June 16, 1933 (ch. 90, 48 Stat. 195), and in order to effectuate the purposes of said title, it is hereby ordered as follows:

"1. Any person submitting a bid to any agency or instrumentality of the United States, or any state, municipal or other public authority, to furnish goods or services at prices which, in accordance with the requirements of one or more approved codes of fair competition, must have been filed prior to their quotation, with the Code Authority, or other designated agency, shall be held to have complied adequately with the requirements of such code of fair competition: (a) if said bidder shall quote a price or prices not more than fifteen per cent below his price or prices filed in accordance with the requirements of such code or codes; and (b) if, after the bids are opened, each bidder quoting a price or prices below his filed price or prices shall immediately file a copy of his bid with the Code Authority or other appropriate agency with which he is required to file prices.

"2. If upon complaint made to the Administrator for Industrial Recovery, he shall find, after due investigation, that the tolerance of fifteen per cent provided in this Order is resulting in destructive price cutting in a particular trade or industry, he is hereby authorized to issue an administrative order reducing said tolerance of fifteen per cent for such trade or industry to the extent he shall find necessary to prevent such destructive price cutting, but in no event to a tolerance of less than five per cent.

"3. The Administrator for Industrial Recovery is directed to cause a study to be made of the effects of this Order upon the maintenance of standards of fair competition in sales to public and private customers and to report to the President thereon within six (6) months of the date of this Order.

"4. All prior Executive Orders, including Executive Order No. 6646, of March 14, 1934, are hereby modified in so far as, and to such extent, as they may be in conflict or inconsistent with this Order."

APPENDIX NO. 77

July 23, 1934.

1. The Administrator for Industrial Recovery has approved the following additional exception from the operation of Executive Order No. 6646:

"All contracts for tug boat and tow boat services with all Departments and Agencies of the United States Government, pending the approval of the Code of Fair Competition for the industry and notice of such approval to the Procurement Division of the Treasury."

APPENDIX NO. 78

August 7, 1934.

Reference is made to Supplement No. 2 to letter on Codes and Marketing Agreements dated June 21, 1934, A.G. 400.13 I.R. The following forms are suggested for certificates required by the exception quoted in this Supplement:

CERTIFICATE OF EXEMPTION

It is hereby certified that the undersigned is not included in or covered by the National Industrial Recovery Act.

_____ _____
(Date) (Individual or firm name)

_____

_____

CERTIFICATE OF EXEMPTION

It is hereby certified that the undersigned, by virtue of Executive Order No. ____(or Administrative Order No. ___) is exempted from operation or application of approved codes and/or the President's Re-Employment Agreement.

_____ _____
(Date) (Individual or firm name)

_____

_____

APPENDIX NO. 79

August 11, 1934.

1. The Administrator for National Recovery has approved the following exception from the operations of Executive Order No. 6646:

"Contracts for public utility services comprising telephone, electricity, gas, water, and steam, whenever in the judgment of the procurement or contracting officer, it is impracticable or impossible to obtain the Certificates of Compliance required by such Order, and when the service is a necessary requisite to the activity and is performed as a part of the vendor's regular and usual public service; provided, however, that the agency awarding any contract under this exception shall certify to National Recovery Administration, via Procurement Division, Treasury Department:

1 - The services covered;
2 - Term of contract; and
3 - The names of the parties thereto."

2. Particular reference is made to subparagraphs 1, 2 and 3. It is requested that a report in accordance with these instructions be submitted in each instance when advantage is taken of the above noted exception. Reports will be forwarded through the Chief of the Supply Arm, Service or Bureau concerned to The Assistant Secretary of War for transmittal to the Administrator for National Recovery via the Procurement Division, Treasury Department.

APPENDIX NO. 80

August 31, 1934.

The following is quoted from Circular Letter No. 54, dated August 24, 1934, Branch of Supply, Procurement Division, Treasury Department:

"Inasmuch as numerour inquiries have been received from the Government Purchasing Officers as to those codes which require Blue Eagle Labels on their commodities, the following list is submitted for the information of those concerned:

Code No.	Industry
5	Coat and Suit
7	Corset and Brassiere
15	Men's Clothing
42	Luggage & Fancy Leather Goods
51	Umbrella Manufacturing
64	Dress Manufacturing
239	Porcelain Breakfast Furniture Manufacturing.
259	Hat Manufacturing
151	Millinery
194	Blouse and Skirt Manufacturing
161	Fur Dressing and Dyeing
164	Knitted Outerwear
84G	Non-Ferrous Hot Water Tank Mfg. (F.M.P.)
111	Robe & Allied Products Manufacturing
118	Cotton Garment
332	Ladies Handbag
362	Photographic & Photo Finishing
373	Infant's and Children's Wear
386	Umbrella Frame and Umbrella Hardware Manufacturing.
401	Copper
408	Undergarment & Negligee
436	Fur Manufacturing
457	Cap and Cloth Hat
474	Needlework in Puerto Rico
201K	Fur Wholesaling
94	Men's Garter
156	Rubber Manufacturing (Rainwear Div.)
363	Men's Neckwear
232	Merchandizing Warehousing Trade (Every Warehouse receipt shall bear a notation showing certificate number)
399	Household Goods Storage and Moving Trade (Must have registration insignia prominently displayed at all times upon outside of vehicle and in the office of the warehouse)
8	Legitimate Theater (All productions shall be advertised under an NRA Label)

It will be noted that any commodities manufactured under these codes, offered without Blue Eagle Label, were undoubtedly not produced under code provisions; and that the certificate of compliance under Paragraph 1-b of Executive Order 6646 may be fraudulent."

APPENDIX NO. 82

September 17, 1934.

1. Supplement No. 3 dated July 13, 1934, to letter dated June 21, 1934, prescribes the special articles to be inserted in supply contracts for materials and supplies involving the expenditure of Public Works Funds.

2. The Special Article entitled "Reports" included in the special articles enumerated in Supplement No. 3 will hereafter be omitted from P.W.A. Supply Contracts.

By order of the Secretary of War:

APPENDIX NO. 83

November 1, 1934.

In order to establish uniform procedure throughout the War Department in connection with telephone service transactions with the American Telephone and Telegraph Company and its subsidiary companies the following instructions are issued:

1. The following statement will be placed on the face of contracts with the companies:

   "The attached statement of N.R.A. compliance is hereby made a part of this contract."

2. To each copy of the contract there will be attached the following statement of N.R.A. compliance:

"STATEMENT OF NRA COMPLIANCE

Supplement to Contract for Service

Furnished to the United States Government by _____
(Name of Telephone Co.)

(In accordance with Executive Order 6646 signed by the President on March 14, 1934, and Procurement Division Order No. 2 signed by Admiral C. J. Peoples on March 17, 1934.)

The Contractor shall comply with each approved code of fair competition to which he is subject, and if he is engaged in any trade or industry for which there is no approved code of fair competition, then as to such trades or industry with an agreement with the President under Section 4(a) of the National Industrial Recovery Act (President' Reemployment Agreement), and the United States shall have the right to cancel this contract for failure to comply with this provision and make open-market purchases or have the work called for by his contract otherwise performed at the expense of the contractor, and the contractor shall not accept or purchase for the performance of this contract or purchase order or enter into any subcontracts for any articles, materials, or supplies, in whole or in part produced or furnished by any person who shall not have certified that he is complying with and will continue to comply with each code of fair competition which relates to such articles, materials, or supplies, and/or in case there is no approved code for the whole or any portion thereof then to that extent with an agreement with the President as aforesaid."

No code compliance certificates other than the above are required in telephone service contracts with those companies and since the statement is made a part of the contract it need not be signed.

3. The following certificate will be used on bills rendered by the American Telephone and Telegraph Company or its subsidiary companies when only telephone service is involved:

"I certify that this bill is correct and just; that payment therefor has not been received; that the rates charged were in effect at the time the services were rendered, and that they are not higher than those charged the general public for similar services; and that the vendor has complied with the President's Reemployment Agreement, as modified for the Bell System Telephone Companies."

4. The following certificate will be used in custom work or in work where there is a transfer of ownership of property or material from the companies to the Federal government:

"I certify that this bill is correct and just; that payment therefor has not been received; that the charges are not higher than those charged the general public for similar services; that except as otherwise noted all unmanufactured articles, materials and supplies furnished have been mined or produced in the United States, and all manufactured articles, materials and supplies have been manufactured in the United States substantially all from articles, materials or supplies mined, produced, or manufactured, as the case may be, in the United States; and that the vendor has complied with the President's Reemployment Agreement, as modified for the Bell System Telephone Companies".

APPENDIX NO. 84

December 19, 1934

"Procedure for Making Purchases Against Contractors Whose Contracts have been Cancelled for Code Violations.

"Whenever purchases are made against a contractor whose contract has been cancelled for code violations the interests of the delinquent contractor should be protected.

"When time permits, the requirements represented by the uncompleted portion of the contract at the time of cancellation should be re-advertised and award made to the low responsible bidder whose bid is in accord with the invitation and which is accompanied by the required code compliance certificate. If in such readvertisement the delinquent contractor submits the low bid complying with the terms of the invitation and accompanied by the required code compliance certificate, award will not be made. The matter will be referred to the Office of The Assistant Secretary of War for a decision as to whether the low bid of the delinquent contractor may be accepted. Advertising time should in no case be less than ten days.

"When time will not permit readvertising, purchase may be made in open market. In making such a purchase the widest competition practicable will be obtained and all bidders on the original invitation will be given an opportunity to re-bid.

"If in an open market purchase against a delinquent contractor the latter submits the low quotation, award of the contract will not be made but the matter will be referred to the Office of the Assistant Secretary of War for a decision as to whether a new contract may be entered into with the delinquent contractor.

"After cancellation of a contract for a code violation purchase of the uncompleted portion of such contract will not be made by award on the original invitation. If, before a contract has been entered into with a low bidder, information is received from the National Recovery Administration that such low bidder is in violation of a code provision his bid will be disregarded, and under such circumstances award may be made to the next low responsible bidder complying with the terms of the invitation.

"Code compliance certificates will be required with all bids or quotations furnished in connection with purchases against delinquent contractors whose contracts have been cancelled for code violations. Bid bonds and performance bonds will be required in such purchases in all cases where they are now required by statute or regulations. In other cases they may be required when the purchasing officer deems they are necessary for the proper protection of the interest of the Government."

APPENDIX NO. 86

December 27, 1934.

The following information contained in Circular Letter No. 72, Branch of Supply, Procurement Division, Treasury Department, is published for the information and guidance of all concerned.

"This office has been advised by the National Recovery Administration that certain of the departments have entered into contracts expiring June 30, 1935 for newspaper matrix and press proof service, on the basis of per square inch as the unit of price. They have been found to be in non-compliance with the Electro-typing and Stereotyping Industry Code, which provides:

'The basis of estimating and pricing in the Electro-typing and Stereotyping Industry shall be the Standard Scale, which scale was adopted on September 24, 1931, or such revisions thereof as may from time to time be approved by the Code Authority and the Administrator.'

"In this connection it is requested that all future bids on newspaper matrix and press proof service be based on the Standard Scale referred to above."

APPENDIX NO. 88

January 29, 1935

By Administrative Order GC-73 dated January 16, 1935, The National Industrial Recovery Board has approved the following exception, No. 80, from the operation of Executive Order 6646:

"Contracts and/or purchase orders for Ford Motor Company's automotive repair and replacement parts for use on presently owned equipment."

APPENDIX 111

EXECUTIVE ORDER

GOVERNMENT CONTRACTS AND CONTRACTS INVOLVING THE USE OF GOVERNMENT FUNDS.

By virtue of authority vested in me by the National Industrial Recovery Act, approved June 16, 1933, and otherwise, I, Franklin D. Roosevelt, President of the United States, hereby order that, unless otherwise specifically provided by law:

1. (a) All invitations to bidders hereafter promulgated by or in behalf of any executive department or independent establishment or other agency or instrumentality of the United States, including government owned and government controlled corporations (all of the foregoing being hereinafter described as agencies of the United States), shall contain a provision to the effect that no bid will be considered unless it includes or is accompanied by a certificate duly executed by the bidder stating that the bidder is complying with and will continue to comply with each approved code of fair competition to which he is subject, and if engaged in any trade or industry for which there is no approved code of fair competition, then stating that as to such trade or industry he has become a party to and is complying with and will continue to comply with the President's Reemployment Agreement.

(b) No bid which does not comply with the foregoing requirements shall be considered or accepted.

(c) All contracts and purchase orders authorized by any agency of the United States shall contain a provision to the effect that the party or parties awarded any such contract or purchase order shall comply with each approved code of fair competition to which it is subject and if engaged in any trade or industry for which there is no approved code of fair competition, then, as to such trade or industry, with the President's Reemployment Agreement; and that the United States shall have the right to cancel any contract for failure to comply with such provision and make open market purchases or have the work called for by the contract otherwise performed, at the expense of the contractor.

(d) No agency of the United States and no Government contractor or supplier shall hereafter accept or purchase for the performance of any contract or purchase order or enter into any subcontracts for any articles, materials, or supplies, in whole or in part produced or furnished by any person who shall not have certified that he is complying with and will continue to comply with each code of fair competition which relates to such articles, materials, or supplies, or in case there is no approved code for the whole or any portion thereof, then, to that extent, with the President's Reemployment Agreement.

(e) The foregoing provisions of this order shall likewise apply to all contracts and purchase orders authorized by any state, municipal corporation, local subdivision, person or corporation in connection with projects carried out or to be carried out, wholly or in part, with funds

loaned or granted by any agency of the United States, and all contracts and agreements for the making of any such loan or grant shall contain a provision requiring the state, municipal corporation, local subdivision, person or corporation receiving such loan or grant, to comply with the provisions of this order.

2. Any person falsely certifying as to compliance as aforesaid who submits any such proposal, bid, contract or subcontract or accept any purchase order, may be punished as provided in Section 10 (a) of the National Industrial Recovery Act, by a fine of not to exceed Five Hundred Dollars ($500) or imprisonment not to exceed Six Months, or both, and in event of any such false certification by any such person, any contract, subcontract, or purchase order to which he is party secured by or in furtherance of any such proposal or bid may be cancelled by the other party thereto, and the unfinished portion thereof completed at the expense of the person guilty of such false certification and his sureties if any.

3. Whenever compliance with any Code of Fair Competition or with the President's Reemployment Agreement is questioned in connection with any proposal, bid, contract, subcontract, or purchase order mentioned herein, the Administrator for Industrial Recovery, or such agency as he shall designate, shall decide such question and, for the purposes of action under this Executive Order, such decision shall be final and conclusive.

4. All provisions of approved Codes of Fair Competition shall apply to the making and performance of contracts with or sales to agencies of the United States.

5. The Administrator for Industrial Recovery may make exceptions in specific cases or otherwise under this Order whenever such action shall be recommended to him by an agency of the United States and when in the judgment of the Administrator justice or public interest will best be served thereby.

6. Heads of Departments of agencies of the United States hereby affected, shall prepare such rules and regulations as may be deemed necessary to carry out the purposes of this Order and submit the same to the National Emergency Council which will coordinate the same and which shall become effective only with its approval and which may prescribe such other and further rules and regulations as may be deemed necessary to carry out the purposes of this order.

7. No disbursing or other officer shall be held liable for any payment made in accordance with this Order.

8. Any provisions of Executive Order No. 6246, signed August 10, 1933, or any other Executive Order, or any rule or regulation in conflict herewith are hereby to that extent modified and rescinded.

The White House

January , 1934.

9775

APPENDIX No. 112

RE: NECESSITY FOR REGULATIONS TO AMPLIFY AND EXPLAIN PROPOSED EXECUTIVE ORDER REGARDING GOVERNMENT CONTRACTS

The Attorney General has eliminated from the Executive Order the provision for the issuance of regulations to "Effect the purpose of the Order". I am informed that his reason for this elimination was that the Order was so complete and self-explanatory that regulations would be unnecessary.

This view merely emphasizes the need of uniform regulations. Many of the Departments, uninformed as to practical NRA conditions, will reach the same conclusion as the Attorney General. Each will attempt its own interpretation resulting in confusion to the contractors and in the administration of the Order.

The order is so stringent and so unyielding that, carried out literally, it is likely to frighten and prevent many contractors from bidding on Government work, likely to cramp industry generally and more seriously, hamper the operations of the Government.

The hard and fast rules of the Executive Order must be modified in many instances and a uniform policy should be maintained in the approach to these to secure efficient compliance without hampering business or the Government. As an instance, the Public Works Regulations now require all materials used in Public Works projects to be produced under Codes or PRA, but the contracting officer may modify this by certifying that it is not in the public interest or that the consequent cost is unreasonable.

When all of the Departments are brought under NRA conditions by the Executive Order, in addition to the above, there will be all of the other Government Departments and Offices. Each will have its own rules and while in a general way there will be uniformity, they will vary in details and according to the respective individual's sympathy and knowledge of the intent and policy of NRA. Even under present conditions, there are conflicts and cross-wires and these will be multiplied by the additional Departments.

At present, each Department has different invitation and proposal forms and also certificates of Compliance covering Emergency funds. These differ according to whether the contract is to be paid for with Departmental or Public Works funds. In the future, they will all be under the same NRA conditions as the Emergency fund projects.

Some require affidavits, others certificates, others secure the effect through quoting the Executive Order of Aug. 10, others use their own interpretation in the contract, etc.

Contractors have complained bitterly at the lack of uniformity, and as we are putting some pretty onerous conditions upon them it is desirable to make compliance as painless as possible.

Proposals should show on their face under what Code the bidder is working, and differences should be investigated. The overlapping Code makes it possible for one bidder to chisel under another on the same work according to the Code under which they are operating.

Requirements of the Order for certificate accompanying or provisions in proposals, contracts, and sub-contracts, should be uniform with all Departments. We have run into many stumbling blocks on account of differences. Very few Government folk outside of NRA know much about Codes and Compliance and their own individual ideas of what the order would result in just about as many different forms as there are contracting officers.

The above is especially true with respect to State, Municipal and similar grants where the United States is not dealing directly with contractor. It is also true with the Reconstruction Finance Corporation which is making loans to private persons and corporations.

Regulations are necessary to secure the Federal Funds being restricted to signers of PRA or adherent of approved Codes.

A recent illustration of this need is the Euclid Avenue Bridge in Des Moines, where a $160,000.00 contract was awarded a contractor who had flatly refused to sign PRA. This was due to lack of a uniform regulation. True, Mr. Ickes who supplied the fund had a regulation covering it but the Bureau of Public Roads, administering it, was apparently unfamiliar with the regulation.

It may be that in preparing a uniform Regulation the differences between various Governmental wage rules may be ironed out. For instance it is possible to have five different sets of wages, hours in Eastern Tennessee, 1st Code, 2nd Public Works, 3rd Bureau of Public Roads, 4th Civil Works and 5th Tennessee Valley Authority.

In this connection, Mr. Ickes has a considerable staff of investigators on PWA and Oil Code matters under Mr. Louis Glavis. The writer has conferred with Mr. Glavis and found him anxious to cooperate with NRA. He has a very considerable staff covering the United States, and thinks he can assume the task of investigating Code Violations affecting Government contracts without material difficulty. A large part of this is PWA anyway, so that only contracts under the regular Appropriations would be added to his present functions.

It is recommended this be taken up officially with Mr. Ickes.

A uniform regulation providing for Departments reporting charges of breach of contract through Code or PRA violation should be adopted. Otherwise NRA cannot require it. Some branches or officers of the Emergency and regular Departments are quite zealous in this matter, while some show less realization of its importance. Breaches should be reported first to NRA to determine whether on facts as stated an NRA violation has occurred, and thence to Mr. Glavis for investigation. Only a uniform regulation issued by competent authority will accomplish this.

Recommended that the National Emergency Council be requested to take steps to secure recommendations of various branches concerning their particular problems and issue regulations covering them.

The Administrator has power to grant exceptions to the Executive Order on recommendation of a Government Department. It is probable he should accompany the regulations by an order granting exceptions under all conditions set forth in the Regulations.

If issued, the Regulations should be carefully indexed and annotated. This is important in what will probably be a pretty large pamphlet. It will also effect our economy as most of us using regulations usually amplify the index and annotate them ourselves and it would save much time to have it done in the first instance.

APPENDIX NO. 113

EXECUTIVE ORDER

Administration of the National Industrial Recovery Act

By virtue of the authority vested in me by the act of Congress entitled "AN ACT To encourage national industrial recovery, to foster fair competition, and to provide for the construction of certain useful public works, and for other purposes," approved June 16, 1933 (Public No. 67, 73d Cong.), and in order to effect the purposes of that act, it is hereby ordered that --

(1) Contracts for Supplies.--Every contract entered into within the limits of the United States (by which is meant the 48 States of the Union, the District of Columbia, the Territories of Hawaii and Alaska, the Panama Canal Zone, Puerto Rico, and the Virgin Islands) by the United States or any of its agencies or instrumentalities for supplies mined, produced, or manufactured in the United States as contemplated by section 2, title III, of the act approved March 3, 1933, entitled "AN ACT. Making appropriations for the Treasury and Post Office Departments for the fiscal year ending June 30, 1934, and for other purposes" (Public, No. 428, 72d Cong.), except as set forth in the proviso under paragraph (a) below, shall provide and require that:

(a) The contractor shall comply with all provisions of the applicable approved code of fair competition for the trade or industry or subdivision thereof concerned, then with the provisions of the President's Reemployment Agreement promulgated under authority of section 4(a) of the foregoing act, or any amendment thereof, without regard to whether the contractor is himself a party to such code or agreement:

Provided, That where supplies are purchased that are not mined, produced, or manufactured in the United States the special or general code of fair practice shall apply to that portion of the contract executed within the United States.

(b) If the contractor fails to comply with the foregoing provision, the Government may by written notice to the contractor terminate the contractor's right to proceed with the contract, and purchase in the open market the undelivered portion of the supplies covered by the contract, and the contractor and his sureties shall be liable to the Government for any excess cost occasioned the Government thereby.

(2) Disbursing Officers.--No disbursing officer shall be held liable for any payment made under the provisions of the foregoing act, or any Executive order issued under authority of that act, or for the unobligated balance of any overpayment involved.

FRANKLIN D. ROOSEVELT.

The White House

August 10, 1933

(No. 6246)

APPENDIX NO. 114.

EXECUTIVE ORDER

Government Contracts and Contracts Involving the Use of Government Funds

By virtue of authority vested in me as President of the United States, it is hereby ordered that:

1. (a) All invitations to bidders hereafter promulgated by or in behalf of any executive department or independent establishment or other agency or instrumentality of the United States, including Government-owned and Government-controlled corporations (all of the foregoing being hereinafter described as agencies of the United States), shall contain a provision to the effect that no bid will be considered unless it includes or is accompanied by a certificate duly executed by the bidder stating that the bidder is complying with and will continue to comply with an agreement with the President under Section 4 (a) of the National Industrial Recovery Act.

(b) No bid which does not comply with the foregoing requirements shall be considered or accepted.

(c) All contracts and purchase orders authorized by any agency of the United States shall contain a provision to the effect that the party or parties awarded any such contract or purchase order shall comply with each approved code of fair competition to which it is subject and if engaged in any trade or industry for which there is no approved code of fair competition, then, as to such trade or industry, with an agreement with the President as aforesaid; and that the United States shall have the right to cancel any contract for failure to comply with such provision and make open market purchases or have the work called for by the contract otherwise performed, at the expense of the contractor.

(d) No agency of the United States and no Government contractor or supplier shall hereafter accept or purchase for the performance of any contract or purchase order or enter into any subcontracts for any articles, materials, or supplies, in whole or in part produced or furnished by any person who shall not have certified that he is complying with and will continue to comply with each code of fair competition which relates to such articles, materials, or supplies, or in case there is no approved code for the whole or any portion thereof, then, to that extent, with an agreement with the President as aforesaid.

(e) The foregoing provisions of this order shall likewise apply to all contracts and purchase orders authorized by any State, municipal corporation, local subdivision, person, or corporation in

connection with projects carried out or to be carried out, wholly or in part, with funds loaned or granted by any agency of the United States, and all contracts and agreements for the making of any such loan or grant shall contain a provision requiring the State, municipal corporation, local subdivision, person, or corporation receiving such loan or grant, to comply with the provisions of this order: Provided, That this paragraph shall not be construed as requiring the restriction of the use of materials to those produced within the United States nor to require price differential in favor of such materials.

2. Any person falsely certifying as to compliance as aforesaid who submits any such proposal, bid, contract, or subcontract, or accepts any purchase order, may be punished as provided in Section 10 (a) of the National Industrial Recovery Act, by a fine of not to exceed Five Hundred Dollars ($500) or imprisonment not to exceed six months, or both, and in event of any such false certification by any such person, any contract, subcontract, or purchase order to which he is party secured by or in furtherance of any such proposal or bid may be cancelled by the other party thereto, and the unfinished portion thereof completed at the expense of the person guilty of such false certification and his sureties, if any.

3. Whenever a dispute shall arise between any agency of the United States and any bidder, contractor, supplier, or other person as to compliance with any code of fair competition or with an agreement with the President as aforesaid in connection with any proposal, bid, contract, subcontract, or purchase order mentioned herein, the Administrator for Industrial Recovery, or such agency as he shall designate, shall decide such dispute and, for the purposes of action under this Executive order, such decision shall be final and conclusive; but the determination of such agency of the United States shall be effective for all purposes pending such decision.

4. All provisions of approved codes of fair competition shall apply to the making and performance of contracts with or sales to agencies of the United States.

5. The Administrator for Industrial Recovery may make exceptions in specific cases or otherwise under this order whenever such action shall be recommended to him by an agency of the United States and when in the judgment of the Administrator justice or public interest will best be served thereby.

6. Any provisions of Executive Order No. 6246, signed August 10, 1933, or any other Executive order, and any rule or regulation in conflict herewith are hereby to that extent modified and rescinded.

FRANKLIN D. ROOSEVELT.

The White House
March 14, 1934.

(No. 6646)

9775

APPENDIX NO. 115.

EXECUTIVE ORDER

Modification of Executive Order No. 6646 of March 14, 1934, Etc.

By virtue of and pursuant to the authority vested in me under title I of the National Industrial Recovery Act of June 16, 1933 (ch. 90, 48 Stat. 195), and in order to effectuate the purposes of said title, it is hereby ordered as follows:

1. Any person submitting a bid to any agency or instrumentality of the United States, or any State, municipal, or other public authority, to furnish goods or services at prices which, in accordance with the requirements of one or more approved codes of fair competition, must have been filed, prior to their quotation, with the Code Authority, or other designated agency, shall be held to have complied adequately with the requirements of such code of fair competition: (a) If said bidder shall quote a price or prices not more than 15 percent below his price or prices filed in accordance with the requirements of such code or codes; and (b) if, after the bids are opened, each bidder quoting a price or prices below his filed price or prices shall immediately file a copy of his bid with the Code Authority or other appropriate agency with which he is required to file prices.

2. If upon complaint made to the Administrator for Industrial Recovery, he shall find, after due investigation, that the tolerance of 15 percent provided in this order is resulting in destructive price cutting in a particular trade or industry, he is hereby authorized to issue an administrative order reducing said tolerance of 15 percent for such trade or industry to the extent he shall find necessary to prevent such destructive price cutting, but in no event to a tolerance of less than 5 percent.

3. The Administrator for Industrial Recovery is directed to cause a study to be made of the effects of this order upon the maintenance of standards of fair competition in sales to public and private customers and to report to the President thereon within six (6) months of the date of this order.

4. All prior Executive orders, including Executive Order No. 6646 of March 14, 1934, are hereby modified insofar as, and to such extent, as they may be in conflict or inconsistent with this order.

FRANKLIN D. ROOSEVELT.

The White House,

June 29, 1934

(No. 6767)

9775

APPENDIX NO. 116.

ADMINISTRATIVE ORDER No. X-48

Order, Granting Limited Exemption from Provisions of Codes of Fair Competition in Connection with Quotations Made to Governmental Agencies

WHEREAS, certain provisions of Codes of Fair Competition, approved under Title I of the National Industrial Recovery Act, are in conflict with statutory provisions or well established procedure relating to contracts awarded by the United States, the District of Columbia, and the various States or political subdivisions thereof (all of which are hereinafter described as governmental agencies); and

It appearing to me that the exemption hereinafter granted is in furtherance of the public interest and will tend to effectuate the policy of said Title of said Act;

Pursuant to the authority vested in me under said Title of said Act by Executive Orders of the President, including Executive Order No. 6543-A. dated December 30, 1933, and otherwise, it is hereby ordered that members of industry subject to codes of fair competition who bid or may bid on contracts to be awarded by governmental agencies be and they are hereby exempted from compliance with any provisions of such codes governing the making of quotations to governmental agencies which prohibit any of the following practices and such members, notwithstanding such prohibitions contained in such codes may:

(a) Quote prices and terms of sale to governmental agencies as favorable as those permitted to be quoted to any commercial buyer for like quantities;

(b) Quote definite prices or terms of sale, not subject to adjustment resulting in increased costs during the life of the contract, for definite quantities and for definite periods not to exceed three months (unless a longer period is now permitted by any such code);

(c) Quote definite prices or terms of sale, not subject to adjustment resulting in increased costs during the life of the contract, for indefinite quantities and for definite periods not to exceed six months (unless a longer period is now permitted by any such code);

(d) Quote prices and terms to apply on contracts to become effective not more than sixty days from the date of the opening of bids;

(e) Quote prices F.O.B. point of origin and/or F.O.B. destination.

PROVIDED, HOWEVER, that the exemption hereby granted shall be limited to and operative only in connection with quotations made by such members to governmental agencies; that nothing in this order contained shall operate to permit deviation from or abandonment of open price and cost protection provisions now or hereafter contained in any such code; and that nothing in this order contained shall relieve any such member at any time from the duty of complying with all other provisions of such codes.

HUGH S. JOHNSON,
Administrator for Industrial Recovery.

Washington, D. C.,

June 12, 1934.

APPENDIX NO. 117.

ADMINISTRATIVE ORDER NO. X-30.

Application of Executive Order 6646.

Exception No. 8 May 15, 1934.

UPON THE RECOMMENDATION OF THE IMMIGRATION AND NATURALIZATION SERVICE, U. S. DEPARTMENT OF LABOR, AND THE DIVISION OF PROCUREMENT, TREASURY DEPARTMENT.

By virtue of the delegation of authority by the President of the United States in Paragraph 5 of the Executive Order 6646, the following exceptions from the operation of the order are hereby made:

"Contracts negotiated by the Immigration and Naturalization Service, U. S. Department of Labor, covering the following services:

1. "Detention and maintenance of aliens in county jails and other public or charitable institutions.

2. "Water, gas, electricity, telephone and other services furnished by public utilities as part of their regular service.

3. "Medical care of aliens by private physicians.

4. "Hospitalization of aliens."

HUGH S. JOHNSON,

Administrator for Industrial Recovery.

OFFICE OF THE NATIONAL RECOVERY ADMINISTRATION
THE DIVISION OF REVIEW

THE WORK OF THE DIVISION OF REVIEW

Executive Order No. 7075, dated June 15, 1935, established the Division of Review of the National Recovery Administration. The pertinent part of the Executive Order reads thus:

> The Division of Review shall assemble, analyze, and report upon the statistical information and records of experience of the operations of the various trades and industries heretofore subject to codes of fair competition, shall study the effects of such codes upon trade, industrial and labor conditions in general, and other related matters, shall make available for the protection and promotion of the public interest an adequate review of the effects of the Administration of Title I of the National Industrial Recovery Act, and the principles and policies put into effect thereunder, and shall otherwise aid the President in carrying out his functions under the said Title. I hereby appoint Leon C. Marshall, Director of the Division of Review.

The study sections set up in the Division of Review covered these areas: industry studies, foreign trade studies, labor studies, trade practice studies, statistical studies, legal studies, administration studies, miscellaneous studies, and the writing of code histories. The materials which were produced by these sections are indicated below.

Except for the Code Histories, all items mentioned below are scheduled to be in mimeographed form by April 1, 1936.

THE CODE HISTORIES

The Code Histories are documented accounts of the formation and administration of the codes. They contain the definition of the industry and the principal products thereof; the classes of members in the industry; the history of code formation including an account of the sponsoring organizations, the conferences, negotiations and hearings which were held, and the activities in connection with obtaining approval of the code; the history of the administration of the code, covering the organization and operation of the code authority, the difficulties encountered in administration, the extent of compliance or non-compliance, and the general success or lack of success of the code; and an analysis of the operation of code provisions dealing with wages, hours, trade practices, and other provisions. These and other matters are canvassed not only in terms of the materials to be found in the files, but also in terms of the experiences of the deputies and others concerned with code formation and administration.

The Code Histories, (including histories of certain NRA units or agencies) are not mimeographed. They are to be turned over to the Department of Commerce in typewritten form. All told, approximately eight hundred and fifty (850) histories will be completed. This number includes all of the approved codes and some of the unapproved codes. (In Work Materials No. 18, Contents of Code Histories, will be found the outline which governed the preparation of Code Histories.)

(In the case of all approved codes and also in the case of some codes not carried to final approval, there are in NRA files further materials on industries. Particularly worthy of mention are the Volumes I, II and III which constitute the material officially submitted to the President in support of the recommendation for approval of each code. These volumes

set forth the origination of the code, the sponsoring group, the evidence advanced to support the proposal, the report of the Division of Research and Planning on the industry, the recommendations of the various Advisory Boards, certain types of official correspondence, the transcript of the formal hearing, and other pertinent matter. There is also much official information relating to amendments, interpretations, exemptions, and other rulings. The materials mentioned in this paragraph were of course not a part of the work of the Division of Review.)

THE WORK MATERIALS SERIES

In the work of the Division of Review a considerable number of studies and compilations of data (other than those noted below in the Evidence Studies Series and the Statistical Material Series) have been made. These are listed below, grouped according to the character of the material. (In Work Materials No. 17, Tentative Outlines and Summaries of Studies in Process, these materials are fully described).

Industry Studies

Automobile Industry, An Economic Survey of
Bituminous Coal Industry under Free Competition and Code Regulation, Economic Survey of
Electrical Manufacturing Industry, The
Fertilizer Industry, The
Fishery Industry and the Fishery Codes
Fishermen and Fishing Craft, Earnings of
Foreign Trade under the National Industrial Recovery Act
  Part A - Competitive Position of the United States in International Trade 1927-29 through 1934.
  Part B - Section 3 (e) of NIRA and its administration.
  Part C - Imports and Importing under NRA Codes.
  Part D - Exports and Exporting under NRA Codes.
Forest Products Industries, Foreign Trade Study of the
Iron and Steel Industry, The
Knitting Industries, The
Leather and Shoe Industries, The
Lumber and Timber Products Industry, Economic Problems of the
Men's Clothing Industry, The
Millinery Industry, The
Motion Picture Industry, The
Migration of Industry, The: The Shift of Twenty-Five Needle Trades From New York State, 1926 to 1934
National Labor Income by Months, 1929-35
Paper Industry, The
Production, Prices, Employment and Payrolls in Industry, Agriculture and Railway Transportation, January 1923, to date
Retail Trades Study, The
Rubber Industry Study, The
Textile Industry in the United Kingdom, France, Germany, Italy, and Japan
Textile Yarns and Fabrics
Tobacco Industry, The
Wholesale Trades Study, The
Women's Neckwear and Scarf Industry, Financial and Labor Data on

Women's Apparel Industry, Some Aspects of the

Trade Practice Studies

Commodities, Information Concerning: A Study of NRA and Related Experiences in Control
Distribution, Manufacturers' Control of: Trade Practice Provisions in Selected NRA Codes
Distributive Relations in the Asbestos Industry
Design Piracy: The Problem and Its Treatment Under NRA Codes
Electrical Mfg. Industry: Price Filing Study
Fertilizer Industry: Price Filing Study
Geographical Price Relations Under Codes of Fair Competition, Control of
Minimum Price Regulation Under Codes of Fair Competition
Multiple Basing Point System in the Lime Industry: Operation of the
Price Control in the Coffee Industry
Price Filing Under NRA Codes
Production Control in the Ice Industry
Production Control, Case Studies in
Resale Price Maintenance Legislation in the United States
Retail Price Cutting, Restriction of, with special Emphasis on The Drug Industry.
Trade Practice Rules of The Federal Trade Commission (1914-1936): A classification for comparison with Trade Practice Provisions of NRA Codes.

Labor Studies

Cap and Cloth Hat Industry, Commission Report on Wage Differentials in
Earnings in Selected Manufacturing Industries, by States, 1933-35
Employment, Payrolls, Hours, and Wages in 115 Selected Code Industries 1933-1935
Fur Manufacturing, Commission Report on Wages and Hours in
Hours and Wages in American Industry
Labor Program Under the National Industrial Recovery Act, The
  Part A. Introduction
  Part B. Control of Hours and Reemployment
  Part C. Control of Wages
  Part D. Control of Other Conditions of Employment
  Part E. Section 7(a) of the Recovery Act
Materials in the Field of Industrial Relations
PRA Census of Employment, June, October, 1933
Puerto Rico Needlework, Homeworkers Survey

Administrative Studies

Administrative and Legal Aspects of Stays, Exemptions and Exceptions, Code Amendments, Conditional Orders of Approval
Administrative Interpretations of NRA Codes
Administrative Law and Procedure under the NIRA
Agreements Under Sections 4(a) and 7(b) of the NIRA
Approve Codes in Industry Groups, Classification of
Basic Code, the -- (Administrative Order X-61)
Code Authorities and Their Part in the Administration of the NIRA
  Part A. Introduction
  Part B. Nature, Composition and Organization of Code Authorities

Part C. Activities of the Code Authorities
Part D. Code Authority Finances
Part E. Summary and Evaluation
Code Compliance Activities of the NRA
Code Making Program of the NRA in the Territories, The
Code Provisions and Related Subjects, Policy Statements Concerning
Content of NIRA Administrative Legislation
Part A. Executive and Administrative Orders
Part B. Labor Provisions in the Codes
Part C. Trade Practice Provisions in the Codes
Part D. Administrative Provisions in the Codes
Part E. Agreements under Sections 4(a) and 7(b)
Part F. A Type Case: The Cotton Textile Code
Labels Under NRA, A Study of
Model Code and Model Provisions for Codes, Development of
National Recovery Administration, The: A Review of its Organization and Activities
NRA Insignia
President's Reemployment Agreement, The
President's Reemployment Agreement, Substitutions in Connection with the
Prison Labor Problem under NRA and the Prison Compact, The
Problems of Administration in the Overlapping of Code Definitions of Industries and Trades, Multiple Code Coverage, Classifying Individual Members of Industries and Trades
Relationship of NRA to Government Contracts and Contracts Involving the Use of Government Funds
Relationship of NRA with States and Municipalities
Sheltered Workshops Under NRA
Uncodified Industries: A Study of Factors Limiting the Code Making Program

Legal Studies

Anti-Trust Laws and Unfair Competition
Collective Bargaining Agreements, the Right of Individual Employees to Enforce
Commerce Clause, Federal Regulation of the Employer-Employee Relationship Under the
Delegation of Power, Certain Phases of the Principle of, with Reference to Federal Industrial Regulatory Legislation
Enforcement, Extra-Judicial Methods of
Federal Regulation through the Joint Employment of the Power of Taxation and the Spending Power
Government Contract Provisions as a Means of Establishing Proper Economic Standards, Legal Memorandum on Possibility of
Industrial Relations in Australia, Regulation of
Intrastate Activities Which so Affect Interstate Commerce as to Bring them Under the Commerce Clause, Cases on
Legislative Possibilities of the State Constitutions
Post Office and Post Road Power -- Can it be Used as a Means of Federal Industrial Regulation?
State Recovery Legislation in Aid of Federal Recovery Legislation History and Analysis
Tariff Rates to Secure Proper Standards of Wages and Hours, the Possibility of Variation in
Trade Practices and the Anti-Trust Laws
Treaty Making Power of the United States
War Power, Can it be Used as a Means of Federal Regulation of Child Labor?

THE EVIDENCE STUDIES SERIES

The Evidence Studies were originally undertaken to gather material for pending court cases. After the Schechter decision the project was continued in order to assemble data for use in connection with the studies of the Division of Review. The data are particularly concerned with the nature, size and operations of the industry; and with the relation of the industry to interstate commerce. The industries covered by the Evidence Studies account for more than one-half of the total number of workers under codes. The list of these studies follows.

Automobile Manufacturing Industry
Automotive Parts and Equipment Industry
Baking Industry
Boot and Shoe Manufacturing Industry
Bottled Soft Drink Industry
Builders' Supplies Industry
Canning Industry
Chemical Manufacturing Industry
Cigar Manufacturing Industry
Coat and Suit Industry
Construction Industry
Cotton Garment Industry
Dress Manufacturing Industry
Electrical Contracting Industry
Electrical Manufacturing Industry
Fabricated Metal Products Mfg. and Metal Finishing and Metal Coating Industry
Fishery Industry
Furniture Manufacturing Industry
General Contractors Industry
Graphic Arts Industry
Gray Iron Foundry Industry
Hosiery Industry
Infant's and Children's Wear Industry
Iron and Steel Industry
Leather Industry
Lumber and Timber Products Industry
Mason Contractors Industry
Men's Clothing Industry
Motion Picture Industry
Motor Vehicle Retailing Trade
Needlework Industry of Puerto Rico
Painting and Paperhanging Industry
Photo Engraving Industry
Plumbing Contracting Industry
Retail Lumber Industry
Retail Trade Industry
Retail Tire and Battery Trade Industry
Rubber Manufacturing Industry
Rubber Tire Manufacturing Industry
Shipbuilding Industry
Silk Textile Industry
Structural Clay Products Industry
Throwing Industry
Trucking Industry
Waste Materials Industry
Wholesale and Retail Food Industry
Wholesale Fresh Fruit and Vegetable Industry
Wool Textile Industry

THE STATISTICAL MATERIALS SERIES

This series is supplementary to the Evidence Studies Series. The reports include data on establishments, firms, employment, payrolls, wages, hours, production capacities, shipments, sales, consumption, stocks, prices, material costs, failures, exports and imports. They also include notes on the principal qualifications that should be observed in using the data, the technical methods employed, and the applicability of the material to the study of the industries concerned. The following numbers appear in the series:

Asphalt Shingle and Roofing Industry
Business Furniture
Candy Manufacturing Industry
Carpet and Rug Industry
Cement Industry
Cleaning and Dyeing Trade
Coffee Industry
Copper and Brass Mill Products Industry
Cotton Textile Industry
Electrical Manufacturing Industry
Fertilizer Industry
Funeral Supply Industry
Glass Container Industry
Ice Manufacturing Industry
Knitted Outerwear Industry
Paint, Varnish, and Lacquer, Mfg. Industry
Plumbing Fixtures Industry
Rayon and Synthetic Yarn Producing Industry
Salt Producing Industry

THE COVERAGE

The original, and approved, plan of the Division of Review contemplated resources sufficient (a) to prepare some 1200 histories of codes and NRA units or agencies, (b) to consolidate and index the NRA files containing some 40,000,000 pieces, (c) to engage in extensive field work, (d) to secure much aid from established statistical agencies of government, (e) to assemble a considerable number of experts in various fields, (f) to conduct approximately 25% more studies than are listed above, and (g) to prepare a comprehensive summary report.

Because of reductions made in personnel and in use of outside experts, limitation of access to field work and research agencies, and lack of jurisdiction over files, the projected plan was necessarily curtailed. The most serious curtailments were the omission of the comprehensive summary report; the dropping of certain studies and the reduction in the coverage of other studies; and the abandonment of the consolidation and indexing of the files. Fortunately, there is reason to hope that the files may yet be cared for under other auspices.

Notwithstanding these limitations, if the files are ultimately consolidated and indexed the exploration of the NRA materials will have been sufficient to make them accessible and highly useful. They constitute the largest and richest single body of information concerning the problems and operations of industry ever assembled in any nation.

L. C. Marshall,
Director, Division of Review.

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